

# REPORTS,

OF

Diverse Choice CASES in LAW.

TAKEN

By those late and most judicious *Prothonotaries* of the *Common Pleas*,

{ RICHARD BROWNLOW, }  
& } *Esq<sup>rs</sup>.*  
{ JOHN GOLDESBOROUGH. }

WITH

## DIRECTIONS HOW TO

proceed in many Intricate Actions, both Reall and Personall; shewing the Nature of those Actions, and the Practice in them; excellently usefull for the avoyding of many Errours heretofore committed in the like Proceedings; fit for all Lawyers, Attorneys, and Practisers of the Law.

Also a most Perfect and exact Table, shewing Appositely the Contents of the whole Book.

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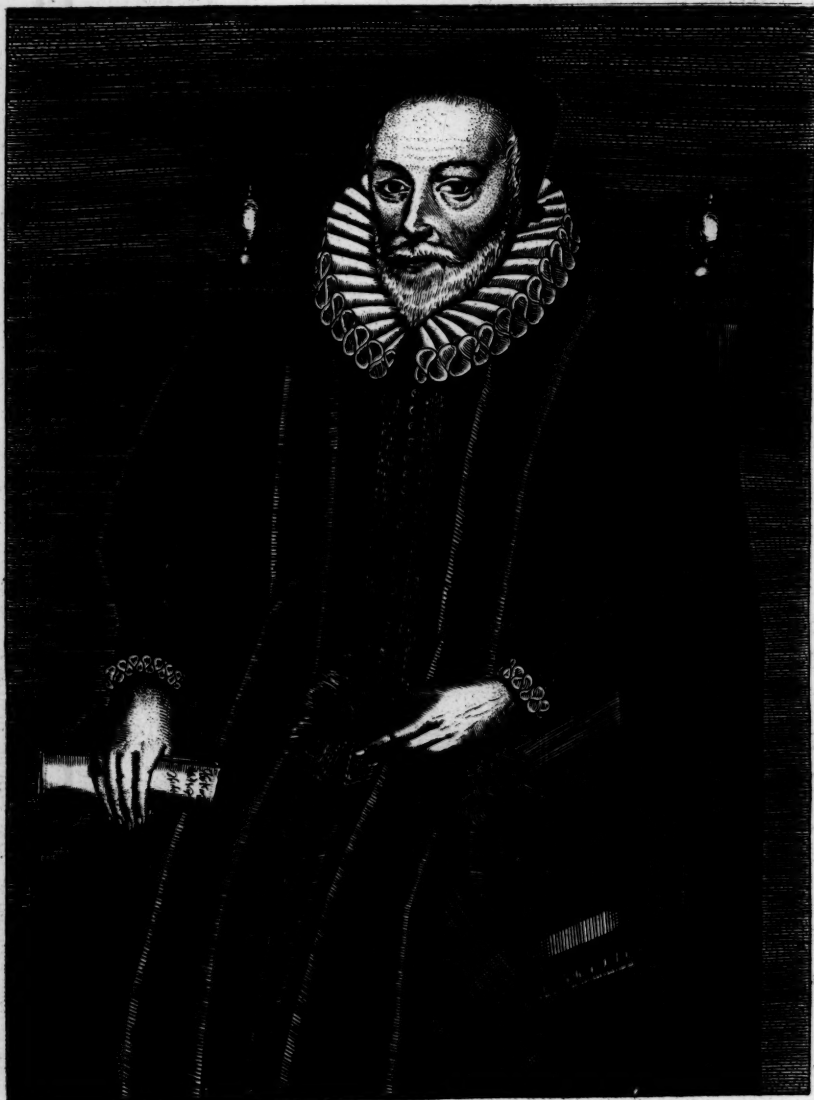
Solon: Συμβολεῖν μὴ τὰ ἥδιστα ἀλλὰ τὸ καλῖστα.

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L O N D O N,

Printed by *Tho: Roycroft*, for *Matthew Walbancke*, at *Grays-Inne Gate*, and *Henry Twyford*, in *Vine Court* in the *Middle Temple*, 1 6 5 1.





*Vera Effigies Richardi Brownlowe Armigeri,  
Capitalis Protonotarii in Curia de Banco.*


*J. de Croft sculp.*







THE  
PUBLISHER  
TO THE  
READER.

 Hese Reports coming unto my hands, under the Commendations of men of so much sufficiency in the knowledge of the Lawes, I could doe no lesse then fear that it would prove too obvious a neglect of Common good to keepe them in the darke, therefore here I present them to the World, to the end that all men may take that benefit by them now being in Print, which some few only have hitherto injoyed by private Copies. And indeed I thinke I shall put it beyond dispute, when I name the two worthy, and late famous Prothonotaries, Mr. Brownlow, & Mr. Goldesborough, whose Observations they were, that they will both profit and delight the Reader, since there are contained under these heads, viz. Actions upon the Case, Covenant,  
A 2 Account,



## To the Reader.

Account, Assise, Audita querela, Debt, (upon almost all occasions) Dower, Ejectment, Formedon, Partition, Quare Impedit, Replevin, Trespas & Wast, Many excellent conclusions, as well of Law, as of the manner of pleadings, Demurrers, Exceptions, Essoins, Errors, and the qualities of many VVrits, with other various and profitable Learning, in which may be found the number of the Roll, for so many as have had the luck of a full debate and definitive sentence. And for the rest, though there is no Judgment in them, so as to determine what the Law is, yet at least they will afford a very considerable compensation for the Readers pains, by opening unto him such matters as are apt for Argumentation, and may acquaint his Genius with the manner of Forensall Disputations, from which benefit, to detain you any longer, will deserve a Censure; therefore I remit you to the matter it self, which I am confident (the Printers faults excused) will easily effect its owne praise beyond my Ability.

Speciall

SPECIAL  
OBSERVATIONS  
AND  
RESOLUTIONS  
OF THE  
JUDGES  
OF THE  
COMMON PLEAS.

Vpon severall Actions upon the Case,  
there depending and adjudged.



*Edley versus Langley, Hill. 14. 7. a. rotulo;* the Plaintiff brought his Action for these words, You are a Bastard, for your Father and Mother were never married. The Defendant pleads that the Plaintiff was a Bastard, and justifies the words laid: and it was held by the Court, that this Issue should be tried by the Countrey, and not by the Bishop, as in other Cases.

*Case for words,  
You are a Bastard, tried by  
the Countrey.*

*Smayles* one of the Attourneys, &c. *versus Smith*, for these words, She, meaning the Plaintiff, took corruptly five Marks of *Brian Turner*, being against his own Client, for putting off and delaying an Assize against him: and after a Verdict, exception was taken against the Declaration, for that the Plaintiff did not expressly alledge that at the time of speaking the words, He was an Attourney, but layd it

*Judgement arrested, because  
the Plaintiff  
did not aver  
that he was an  
Attorney at  
the time of the  
words spoken,*

that

that he had been an Attourney. The Court held the words would bear Action.

*Case for words which did amount to but petty Larceny.*

**M**ale versus Ket, *Hill. 14. Jac. rotulo 1506.* for these words, *William Male* did steal my Corn out of my Barn. Judgement for the Plaintiff. The Court held that an Action would lie for these words, You are a Thief and have stolen a Cock, which was but Petty Larceny.

**C**owte versus Gilbert, *Hill. 10. Jac. rotulo 3176.* Thou art a Thief, and hast stolen a Tree. Judgement, that the Plaintiff should take nothing by his Writ. The like, Thou art a Thief, and hast stolen my Maiden-head; no Action.

**H**arding versus Bulman, *Hill. 15. Jac.* The Plaintiff declares, that in such a Term he had brought an Action of Case against *B.* for scandalous words, to which he pleaded not guilty; and at that Triall gave in Evidence to the Jury, to take away the Plaintiffs Credit and Reputation, that the Plaintiff was a common Lyar, and recorded in the Star-chamber for a common Lyar, by reason whereof, the Jury gave the Plaintiff but very small Damage, to the Plaintiffs Damage of, &c. The Defendant pleads not guilty. And it was moved in Arrest of Judgement, that the Action would not lie. And of that opinion the Court seemed to be.

**B**ridges one of the Attourneys, versus Playdell, for words, You, meaning the Plaintiff, have caused this Boy, meaning *A. W.* then present, to perjure himself. Judgement for the Plaintiff.

*For calling one witch, no Action will lie.*

**S**Tone versus Roberts, *Mich. 15. Jac. rotulo 635.* for these words, Thou art a Witch and an Inchanter, for thou hast bewitched Stranges Children; no Action lies but if thou say, Thou art a Witch and hast bewitched Children, and that they are wasted and destroyed; they are actionable.

*If Felony be committed, good cause to arrest one for it, but not to speak words to de-  
some one.*

**S**carlet versus Stile, *Trin. 14. Jac. rotulo 541.* for these words, Thou didst steal a Sack and a Curricomb, and I will make thee produce it; and thou didst steal my Fathers Wood, and didst give it to a Whore. The Defendant justifies, that such a day the Goods were stolen, and there was a common fame and report, that the Defendant had stolen them, and upon that report the Plaintiff did vehemently suspect that the Defendant had stolen them, and thereof did inform a Justice of the Peace, and complaining of the Defendant to the Justice, and informing him of the Premises, did speak the words before mentioned.

tioned. If a Felony be committed, it is good cause to arrest one for Felony, but not to speak words to defame one.

If there be two Issues in severall Counties in Trover, and one is tried, and Judgement and Execution of the Costs and Damages; and afterwards the other Issue is tried, and Costs thereupon, the last is erroneous, as to the Costs. *Brocas Case*.

Note, Trover was brought against Husband and Wife for Goods, which came to the hands of Husband and Wife, & the Conversion was alleadged to be by the Husband alone, for the Wife could not convert. And the Court held that the Action would not lie against the Wife.

*A Feme covert cannot convert.*

**M***O se versus Canham, Mich. 6. Jac. rotulo 508.* The Plaintiff declares, that one *Lever* was indebted in such a sum, and for the payment thereof had delivered to the Plaintiff divers Goods of the said *Lever*: the Defendant in consideration that the Plaintiff would deliver to the Defendant the said Goods, promises to pay the Plaintiff the money due from *Lever*: and exception was taken to the Declaration, for that the certainty of the Goods were not expressed, and for that the consideration was but collateral. Another Exception for that the Plaintiff might grant the Goods over, but the Court held the contrary. And Judgement for the Plaintiff.

*Action upon the case brought upon a collateral consideration, and good.*

**S***mith versus Boller Sheriff of London, Pasc. 9. Jac. rotulo 1353.* In case for that the name of the Sheriffs were omitted, on the *venire fac.* And for that cause one Judgement given for the said *Smith* was reversed by Writ of Error. And for that Misprision *Smith* brought such Action of the Case.

*Judgement reversed by writ of Error, because Sheriffs name was omitted on the venire fac.*

**H***arris versus Adams,* If thou hadst had thy Right, thou hadst been hanged for breaking of *Paches* House; the words not actionable.

*Case for words not actionable.* O

Thou art a Thief, thou hast stolen the Town-beam, meaning the Town of *Wickham*: Serjeant *Hutton* of opinion the Action would lie.

**S***tephens Attourney, versus Battyn,* for words, Thou hast cozened *Sm. Windsor* of his Fee, and I will sue thee for it in the Star-chamber, for that thou didst not come for *Windsor*. Judgement for the Plaintiff. *Trin. 11. Jac.*

*Case for words.*

**B***radley versus Jones, Trin. 11. Jac. rotulo 3390.* The Plaintiff brings this Action upon the Case for unjust vexation. The Defendant had exhibited Articles against the Plaintiff, to have the good Behaviour against him, and took his Oath before Doctor *Cary* one of the Masters of the Chancery: and afterwards the Defendant ceased prosecution

*A man shall not be punished for mistaking the Law.*



tion there, and obtained from the Kings Bench a *Supplicavit*, to have the good Behaviour there. And the Court was of opinion, that the Action would lie, because he prosecuted in the Kings Bench and not in the Chancery. But the Court said, that if he had prosecuted in the Chancery, though the Articles had been scandalous, yet no Action would have lyen; for a man shall not be punished for mistaking the Law, for he may be misadvised by his Counsel.

Case for words,

**B**rooks versus Clerk, *Pasch. 11. Jac. rotulo 307.* Action brought for these words, His Son *Brooks* hath deceived me in a Reckoning for Wares. And his Debt-book which he keepeth for Sale of Wares in his Shop is a false Debt-book; and I will make him ashamed of his Calling. *Hubbart* and *Nichols* against the Plaintiff, and *Warburton* for the Plaintiff.

*Pasch. 11. Jac. rotulo 2147.* Action of the Case brought for a Nuisance for building the Defendants House so near the Plaintiffs, that a great part of it superpendes. And the Plaintiff in the conveying his Title, shews a Lease for years made to him, if the Lessor should so long live, and doth not aver the Life of the Lessor, but saith, that by vertue of the Demise the Plaintiff hath been and then was thereof possessed, and adjudged sufficient.

The like.

**M**orton versus *Leedell*, *Hill. 10. Jac. rotulo 1783.* Action of the Case for these words, He, meaning the Plaintiff, is a lying dissembling Fellow, and a mainsworn and forsworn Fellow. And Judgment for the Plaintiff after divers motions.

The like for words.

**T**homas Attourney versus *Axworth*, *Pasch. 11. Eliz. rotulo 352.* Action of the Case for these words, This is *John Thomas* his writing, and he hath forged this Warrant, meaning a Warrant made by *Buller* Sheriff of that County, upon a *Capias* prosecuted out of the Court of Common Pleas by *M. H.* against the Defendant, and directed to the Sheriff.

**R**ow versus *Alport*, *Mich. 11. Jac. rotulo 1527.* Action upon the Case brought for suing in the Admiral Court, for a thing done upon the Land, and not upon the high Sea.

**B**ray versus *Ham*, *Trin. 13. Jac. rotulo 1994.* Action of the Case for these words, Thou art a cozening Knave, and thou hast cozened me in selling false Measure in my Barley, and the Countrey is bound to curse thee for selling with false Measure, and I will prove it; and thou hast changed my Barley which I bought of thee. And the Plaintiff sets forth in his Declaration, that he was Bayliff to *W. C.* and

*H.C.*

*H.C.* of certain Lands in *P.* for three years; and during the said time, had the care and selling of divers Corn and Grain growing upon the same Land: and after Triall and Verdict for the Plaintiff, it was moved in Arrest of Judgement, that the Action would not lie; but the Court were of a contrary opinion, and Judgement was given for the Plaintiff.

**B***rown* versus *Hook*, *Pasch.* 13. *fac. rotulo* 234. Action of the Case for these words, *Brown* is a good Attourney, but that he will play on both sides. And it was moved in Arrest of Judgement, that those words would not bear an Action, but the Court held they were actionable, but did not give Judgement, because the Plaintiff did not shew in his Declaration, that the words were spoken of himself.

Judgement arrested, because the Plaintiff omitted to shew in his Declaration the words were spoken of himself.

**S***tober* versus *Green*, *Mich.* 11. *fac. rotulo* 1291. Action of the Case for these words, Thou didst keep and sell by false Weights, and in 24.s. bestowing, thy Weights were false two Ounces, and thy Man will be a Witness against thee, and I will prove it. The Defendant pleaded that the Plaintiff occupied one Shop, and kept unlawfull Weights, and by such Weights sold, by reason whereof he said these words, *Videlicet*, Thou didst keep and sell by unlawfull Weights, and in 24.s. bestowing, thy Weights were false an Ounce and three quarters, and thy Man, &c. And traversed the words in the Declaration, and it was adjudged a naughty Traverse, for that the words in the Bar, and justified by the Defendant are actionable.

The Defendants Justification adjudged naughty, because he justified for words that were actionable.

**A***gar* versus *Lisle*, *Mich.* 11. *fac. rot.* 318. Action of Trover brought in *York-shire*, the Defendant justifies for Toll at *Darnton* in *Darham*, and traverse, &c. The Court doubts of his Traverse, being onely for the County of *York*, whereas it ought to be any where else generally. And *Hobart* said, the Bar was nought, because in the justification, no conversion was sufficiently alledged. And note, that if a man doth a thing which is allowable by the Law, as to distrain Cattle, and impound them, that is no conversion; but if he work them it is a conversion.

To do a thing allowable by Law is no conversion.

**A***ustin* versus *Austin*, *Trin.* 10. *fac. rotulo* 3558. In Trover, the Defendant pleads, that before the time that the Plaintiff supposes the Goods to come to the Defendants hands, one *S. A.* was possessed of the Goods, and amongst other Goods sold them to the Defendant, but kept them in his own hands, and afterwards sold them to the Plaintiff, by reason whereof the Plaintiff was possessed, and afterwards looses them, and they came to the Defendants hands, who converts them, as it was lawfull for him to do. The Plaintiff demurs, and it was held a naughty Bar, for it amounts to a *Non cul.* And *Cook* doubted whether the Court should compell the Defendant to plead

The Defendants Justification amounted but to Non-guilty, and adjudged naughty.

plead, *Non est*. or award a Writ of Injury. And a Writ of *Inquire* was awarded.

Judgement arrested, for want of certainty in the Count.

**A** *Llyn versus Sparkes, & al. Trin. 8. Jac. rotulo 1606.* Action of the Case brought for stopping up the Plaintiffs way, and the Plaintiff declares that one *H.B.* was seised of the Mannour of *M.* of which two Acres were customary Land, and that the Lord of the Mannour had for himself, and his customary Tenants for the said two Acres, a certain high-way in, by, and thorow, &c. And that the Lord of the Mannour granted the said two Acres to the Plaintiff, and that the Defendant made and erected one Ditch and Hedge, by reason whereof the Plaintiff lost the benefit of his way; and after Triall and Verdict, for the Plaintiff it was moved in Arrest of Judgement, because it did not appear in the Declaration to what Village the common way led to. And it was held a good Exception and Judgement arrested: but if it had been unto a common way there, or in such a Village, it had been good.

Judgement arrested, for that the consideration was not valuable.

**K** *Ent versus Prat, Hill. 7. Jac. rotulo 131.* Action upon the Case, the Plaintiff declares, that *Prat* was Rector of the Church of *S.* And that *Kent* was lawfully possessed of the Parsonage-house, and that there were divers strifes between the Plaintiff and Defendant for the said Rectory: and that the said *Prat*, in consideration that the said *Kent* would surrender the Parsonage-house, and the Gleab-land, which were then sowed by *Kent*, he promised, &c. And after Triall it was moved in Arrest of Judgement, that the Surrender was not a valuable consideration, because it did not appear to the Court that *Kent* had any Estate but at will, which is determinable at the will of the Lessor, and so he surrendred nothing, but if these words had been in the count, *viz.* of the Demise of the said *Prat*, For a term of divers years, it had been good, though the certainty of the years had not been expressed.

**S** *Mailes versus Belt, & uxorem, Hill. 1. Jac. rotulo 1372.* Action upon the Case, for words spoken by the Woman, *Videlicet*, Thou art a Theif, and a mainforn Theif, and a Verdict for the Plaintiff, and moved in Arrest of Judgement, that the Action would not lie, but Judgement was arrested, because the Issue was *Quod ipsi non sunt cul.* and it ought to have been that the Woman was not guilty.

Case for words, for calling an Attourney Bribing Knave.

**Y** *Ardley Attourney, versus Ellyll, Mich. 11. Jac. rotulo 1252.* Action upon the Case brought for these words, Your Attourney, meaning the Plaintiff, is a bribing Knave, and hath taken twenty pounds of you to cozen me: the Plaintiff laid a Communication, such a day and place

place by the Defendant with one *B.* which *B.* had before that time retained the Plaintiff to be his Attourney, concerning the Plaintiff, *Hubbart* and *Nichols* held the words actionable, *videlicet*, for the first word, Bribing Knave, and that the last words did not extenuate or weaken the former: If the words touch him in his Profession, the Action will lie, for it is against the Oath of an Attourney. *Birtridge* is an old perjured Knave, and that is to be proved by a Stake parting the Land between *M.* and *C.* One Judge for the Plaintiff, and two for the Defendant.

*Cornhill* versus *Cowler*. Trespass upon the Case brought against *Baron & Feme* for words spoken by the Woman; the *Baron & Feme* plead *Quod ipsi in nullo sunt cul. de premissis*, and the Jury finde that the Woman was guilty, and Exception taken after Triall to the Issue and Verdict, and they were both aided by the Statute of *Jeofayles*. But another Exception was, that the Action was laid in *Suff.* And the Addition in the Writ was *A. C. de C. in Com. Essex*, and in the Declaration the Plaintiff alleges, that the words were spoken at *C.* in the County aforesaid, which was in the County of *Essex*, and so a Mistryall.

Judgement arrested being mis-tried.

*Chimery* versus *Cod*. Action upon the Case, upon a promise to discharge and save harmless the Plaintiff against all manner of persons, and shews a Suit for Tithes in *Normich* Court, and the Defendant replies that the Plaintiff was not damnified, and the Plaintiff rejoyns that he was damnified, to wit, at *S.* aforesaid, which was in the County of *Suffolk*, where the Action was brought, and the Court held the Cause was mis-tried, because the Suit was in *Normich*, and ought to be tried in *Normich*, and not in *Suffolk*, and these words *Apud S. predictam* were idle.

*Tillet* versus *Brnen*. for words, *Trin. 12. Jac.* The Plaintiff shews a Suit in *Colchester* Court, and a Triall there before the Bayliff, and that the Plaintiff gave in Evidence his knowledge; and the Defendant willing to defame the Plaintiff, as if he had given false Evidence, said of the Plaintiff, Thou art as much forsworn, meaning in the Evidence aforesaid by the Plaintiff, upon his Oath in Form aforesaid given, as God is true; and moved in Arrest of Judgement, that the *Inuendo* would not maintain the Action, and so adjudged.

An inuendo. will not maintain an Action.

*Ampleigh* versus *Braithwaie*, *Mich. 13. Jac. rotulo 712.* Action upon the Case, in which the Plaintiff sets forth, that whereas the Defendant had feloniously killed a Man, and after the Felony committed did earnestly request and solicit the Plaintiff that he would labor and indeavour to obtain from the King, for the Defendant, a Par-

don:



don for the Felony, upon which the Plaintiff at the instance and request of the Defendant, by all lawfull ways and means possible, did often, and by many days labor and indeavor to obtain, &c. *Videlicer*, by riding and journeying at his own cost and charges, from *L.* unto the Village of *R.* where the King then was, and from thence back again to *L.* to obtain, &c. The Defendant afterwards at *H.* in consideration of the Premises, did assume and promise to give the Plaintiff an hundred pounds of lawfull money, when he should be required: and a Verdict for the Plaintiff, and moved in Arrest of Judgement, for that it did not appear that the Plaintiff had spoken to the King for a Pardon, nor done any thing, or obtained a Pardon: and Judgement was given for the Plaintiff; *Wynch* said, the Promise was subsequent to the Request, and good; for although the Defendant had no good by it, yet because the Plaintiff was at costs and labor, and it was at the Defendants request, sufficient to maintain the Action. If I request one to do a thing for me, and make no promise, and after you let me know that you did such a thing for me, and then I promise to discharge or pay you, this is a good consideration, although the Promise go not with the Request; otherwise it is where a man doth me a curtesie without any request. And *Hobart* took this difference between a consideration executed and executory; for where *Non assumpsit* is pleaded to a consideration executed, the Plaintiff needs onely to prove the Promise; for where the consideration is executory, the Defendant may take Issue as well for not performing the consideration executory, as upon the Promise.

Difference between a promise executory and executed: quod nota.

Non cul. pleaded where Non assumpsit should have been pleaded, and adjudged a good Issue.

**G**lover versus Taylor, Hill 13. Jac. rotulo 852. Action upon the Case, for ill using a Horse, so that the Horse died, and the Defendant promised to re-deliver the Horse. The Defendant pleads *Non cul.* And after a Verdict it was moved in Arrest of Judgement, because he did not plead *Non assumpsit*. And it was held a good Issue.

Action of case for words, upon the statute of 1. Jac. against Invocation of Spirits.

**M**arshall versus Steward, Mich. 13. Jac. rotulo 1134. Action upon the Case reciting the Statute of 1. Jac. against Invocation, &c. for these words, The Devil appeareth to thee every night in the likeness of a black Man, riding on a black Horse, and thou conferrest with him, and whatsoever thou dost ask he doth give it thee, and that is the reason thou hast so much money, and this I will justifie. Judgement for the Plaintiff.

In Trover Judgement by *Nihil dic.* and Exception taken to the Declaration, to stay the filing the Writ of Inquiry, because no day of the conversion was in the Declaration, and by two Judges held naught. Mich. 14. Jac.

**P**arker versus Parker, Hill. 12. Jac. rotulo 426. In Trover after a Verdict, it was moved in Arrest of Judgement, that the imparlance Roll was entred with Spaces for the possession and conversion. but both those Spaces in the Issue were filled up, and held good. The Imparlance was entred. Mich. 12. Jac. rotulo 547.

*Ebe Imparlance vole supplied by the Issue being perfect.*

**W**Hitepain versus Cook, Pasch. 12. Jac. For words, Thou art a Rogue, and I will prove thee a Rogue: no Judgement.

**S**tone versus Bates. A man may well incourage one that was robbed, to cause the Felon to be indicted, and accompany him to the Assizes, and this shall be lawfull for to do, without incurring the danger of an Action upon the case, upon conspiracy; but if he knew that he was not robbed, then he is in danger of the Action upon the case.

**C**Ope and his Wife administratrix, Plaintiffs, versus Lewyn, Trin. 12. Jac. rotulo 1714. An Action upon the case brought upon a promise made to the Intestate, and in the Court omits to shew the Administration: and after Triall, that Fault moved in Arrest of Judgement; and the whole Court was of opinion, that he should not have his Judgement, for it did not appear that he was Administrator; for at the Common Law no Administration lay, but the Ordinary ought to have the Goods.

*Judgement arrested, for not shewing the Letters of Administration.*

**H**Arvey Attourney, versus Bucking. Mich. 12. Jac. rotulo 842. Action of the case for slanderous words, He, meaning the Plaintiff, shewed me first a Bill of fourty pounds, without a Seal, meaning the said Bill by the said E. as aforesaid, sealed and delivered; and afterwards he shewed me the same Bill with a Seal, and he, meaning the Plaintiff, hath forged the Seal of the same Writing, meaning the Seal of the said Bill by the said E. as aforesaid, sealed and delivered. The Defendant traverses the words, and a Verdict for the Plaintiff, and it was alleadged in Arrest of Judgement, that the Declaration was naught, for that it did not directly appear that there was any communication between the Plaintiff and Defendant concerning the Bill, but onely in the (*innendo*) which will not maintain the Action, and Judgement arrested.

*Judgement arrested, for that the Communication did not appear but by the Innendo.*

**M**orton versus Leedall, Hill. 10. Jac. rotulo 1783. Action upon the case for these words, He is a lying and dissembling Fellow, and a mainsworn Fellow. And a Verdict for the Plaintiff. And afterwards it was moved in Arrest of Judgement, that the Action would not lie, but at length Judgement was given for the Plaintiff. And Serjeant Hutton cited the like case, adjudged *int.* & Barnes, He is a mainsworn Villain.

*Action of the case for calling a man mainsworn fellow.*

*& Barnes, He is a Skipwast*

Moved in Arrest of Judgement, because no Demand alleadged, but not allowed.

**S**Kipwasth versus Skipwasth, Hill. 14. *Iac. rotulo* 3472. Action upon the case, that whereas the Defendant in consideration that the Plaintiff would marry one *A. B.* did assume to pay the Plaintiff twenty pounds when he should, after the Marriage, be thereunto requested: The Plaintiff alleadges no special Demand: and that Fault was moved in Arrest of Judgement. *Hobart* and *Wynch* were for the Plaintiff, *Warburton* for the Defendant.

Judgement arrested, for uncertainty in the Declaration.

**J**otham versus Ball, Hill. 12. *Iac. rotulo* 1920. Action upon the case for slanderous words, *Videlicet*, Your Master *Euseby*, meaning the Plaintiff, is a Rogue, a Rascal, and Forger of Bonds; the Plaintiff laid a *Colloquium* between the Defendant and one *R. G.* And after Verdict moved in Arrest of Judgement, for that it did not expressly appear, that the said *R. G.* at the time of speaking the words was Servant to the Plaintiff: and Judgement was stayed by the Court.

By a general Pardon both Punishment and Fault taken away.

**C**oddington versus Wilkin, for words, *Trin.* 12. *Iac.* He is a Thief, and why will you take a Theifs part: spoken 1. *Martii* 10. *Iac.* The Defendant justifies the words, because the Plaintiff stole Sheep. The Plaintiff by way of replication sets forth a general Pardon granted such a time, and further saith, that if any Felony were committed it was before the general Pardon made; and shews himself to be a Subject, and no person excepted in the Pardon. The Defendant demurs. The Court were of opinion, that by the Pardon both the Punishment and Fault were taken away; and that the wrong was done to the King by the Common Law; and the King being the supreme Head, if he pardons, the party is cleared of the wrong. As if a Villain be infranchised, he from thenceforth is no Villain.

Note, if a man upon good consideration promise to become bound to another by his Obligation to do an Act: and if he do not become bound, Action upon the case will lie against him: and the Plaintiff is not bound to tender him an Obligation, but the Defendant hath took it upon himself to do it.

Promise upon condition, notice not necessary.

**R**ichards versus Carvamell. Action of the case brought, and counts for non-payment of money at the Plaintiffs next coming into the County of *Somerset*; and avers, that such a day he came into the County of *Somerset*, *Videlicet*, apud *T. in Com. Somerset*, and that the Defendant, though often requested, hath not paid. And Exception taken because the Plaintiff did not alleadge in his count, that he gave notice to the Defendant when he came into the County of *Somerset*, but not allowed, and Judgement given for the Plaintiff. And note, when a man assumes to pay money, or do any thing upon condition, the Defendant may take Issue upon the condition, and needs

Nota.

Q

not plead *Non assumpsit*, but if he pleads *Non assumpsit*, then he confesses the performance of the condition, which mark.

**A**ustin versus Jarvis, Trin. 13. Jac. rotulo 2180. The Plaintiff declares, that such a Day and Year he bought of the Defendant a Horse for a peice of Gold of the value of 22.s. by him to the Defendant then in hand paid, and for a 11.l. to be paid to the Defendant at the Day of Death or Marriage of the Plaintiff, which should first happen, for payment of which 11.l. the Plaintiff should bring to the Defendant one sufficient man to be bound, together with the Plaintiff to the Defendant: the Defendant in consideration thereof assumes to deliver the said Horse to the Plaintiff, when he should be thereunto requested: and the Plaintiff avers, that such a Day he brought the Defendant one sufficient man, *Videlicet, I. A. de B. Yeoman*, to be bound together with the Plaintiff to the said Defendant for the payment of the said 11.l. and shews that he requested the Defendant to deliver the said Horse, yet the Defendant hath not delivered him, according to his promise. The Defendant pleads *Non assumpsit*. And a Verdict for the Plaintiff: and moved in Arrest of Judgement, for that the Plaintiff at the time of the Contract was an Infant, and that he could not perform his promise by reason of his Infancy, and therefore the promise void; and another Exception, for that it was not alleged in what sum the Plaintiff and his Surety offered to be bound; and Judgement was, that the Plaintiff, *Nihil capiat per breve*.

Judgement arrested, for uncertainty in the Count, and for that the promise was made by an Infant.

**J**acob versus Songate, Trin. 9. Jac. rotulo 2776. An Action upon the case brought for this word, Perjured. The Defendant justifies that it was found by Verdict, that the Plaintiff was perjured, but no Judgement entred upon that Verdict. And whether the Plea were good, being there was no Judgement, was the Question: and it was adjudged no Bar, because no Judgement was given in the first Action: and so Judgement entred for the Plaintiff.

Justification for calling a man perjured, disallowed, because he was not convicted.

**C**rutall versus Hofener, Pasch. 16. Jac rotulo Action of the case for these words, He, meaning the Plaintiff, hath caught the French Pox, and brought them home to his Wife. And Judgement for the Plaintiff.

**T**hornton versus Iepson. The Plaintiff being a Currier brought an Action upon the case for these words, He is a common Barretor; but the words would not lie for a man of that Profession, but would lie for a Justice of Peace or Lawyer.

Action of the Case will not lie for calling a Currier Barretor.



For this word  
Papist no Action  
will lie, unless  
spoken of a  
Bishop.

**I**reland versus Smith, Hill. 9. *Iac. rotulo* Action upon the case brought for these words, You *Norgate* take part against me with *Ireland*, who is a Papist, and hath gotten a Pardon from the Pope, and can help thee to one, if thou wilt. The Plaintiff laid a communication between the Defendant and *Norgate*, and alleadges himself of the age of 40. years, and not above, because it might appear to the Court that he was born within Queen *Elizabeths* Reign. The Court held the Action would not lie, as it was adjudged in *Halls* case, and for this word Papist no Action will lie.

Nota.

If I deliver my Goods to you to keep, and I request them, and you deny the Delivery of them; now an Action of Trover will lie, otherwise it is without a Deniall; if I distrain Cattle, I must not use them.

Action of the  
Case for double  
prosecution of  
a fieri fac.

**W**Arter versus Freeman, Mich. 15. *Iac. rotulo* 1941. Action upon the case brought for that the Defendant sued out a *Fieri facias* upon a Judgement which he had against the Plaintiff, upon which Judgement the Defendant had before sued out a *Fieri facias*, and the Sheriff of *Oxford* had upon the first *Fieri facias* returned, that he had levied the Debt and Damages, and that they remained in his hands for want of Buyers; and the Defendant knowing that the Sheriff had levied the Debt and Damages, and intending to charge him, again prosecuted another *Fieri facias*, and that the Sheriff had again levied the said Debt and Damages, and hath paid the Debt and Damages to the Plaintiff, to wit, at *Westminster*, in *Com. Middlesex*, where the Action was brought; and Judgement after Debate was given for the Plaintiff, though the Defendant alleadged that the *Fieri facias* was an Act in Law, and so no cause of Action against him.

upon a non est  
invent. returned  
upon an  
Outlawry, where  
the party escaped,  
the Plaintiff hath his  
Election where  
to bring his  
Action.

**P**Arkhurst versus Powell, vic. *Denbigh*, Mich. 15. *Iac. rotulo* An Action of the case for a false Return of a *Capias utlagat.* and declares that he prosecuted a *Capias utlagat* directed to the Sheriff of *Denbigh*, where the Defendant inhabited, and delivered the said Writ to the Sheriff to be executed; and the Defendant being then in the company of the Sheriff, and might safely have arrested him, did not, but suffered him to escape, and returned that he was not to be found; and upon Not guilty pleaded, it was tried in the County of *Middlesex*, where the Action was brought; and moved in Arrest of Judgement, that the Triall ought to be in *Denbigh*, because the not arresting was the principal matter, but because the Action was grounded upon double matter, the Plaintiff had his Election to bring his Action, either in the County of *Denbigh* or *Middlesex*, by the whole Court.

Bland

**B**land versus Edmonds, Pasch. 16. Jac. rotulo 444. Action upon the Case brought for these Words, *Videlicet*, George Bland is a troublesome Fellow, and he did combine with thee to trouble the Country, and I hope to see thee at the next Sessions indicted for Barratry, or for sheep-stealing, as George Bland was at the last Sessions, for Bland was indicted the last Sessions for sheep-stealing. And it was held by the whole Court, that those Words would not bear an Action, the Plaintiff layed the Words to be spoken to one Jo. Eagle: and the Declaration was held naught and insufficient, because it was not averred, that the Plaintiff was not indicted at the Sessions.

*Judgement arrested for want of an Averment.*

**B**radshaw versus Walker, Hill. 16. Jac. rotulo Action upon the case brought for these words, *Videlicet*, Thou art a filching Fellow, and didst filch from A.B. 4*l*. And Judgement that the Plaintiff should take nothing by his Writ; for it shall not be intended that he stole the money.

**A**Dams versus Fleming, Hill. 16. Jac. rotulo 890. Action of the case brought for these words, *Videlicet*, He hath forsworn himself before the Council of the Marches (meaning the Council of the Marches of Wales) in the Suit I had against him there, and I will sue him for Perjury there. And after Verdict for the Plaintiff, moved in Arrest of Judgement, that the words were not actionable for their uncertainty, because the Court could not take notice that they had authority to hold plea in matters of record.

*Judgement arrested for the uncertainty of the Count.*

Judgement for the Plaintiff for these words, Thou art a false forsworn Knave, for thou didst take a false Oath before a Judge of Assize to hang a man.

**G**Ore versus Colthorpe, Trin. 5. Jac. rotulo The Declaration was in consideration that the Plaintiff would give credit to E.C. then servant to the Defendant for any thing the said E. should deal for, to the use of the Defendant, with the Plaintiff, promised that he would see the Plaintiff contented that which the said E. should deal for with the Plaintiff, for the use of the Defendant any way, when the said Defendant thereof (after it should become due) should be requested, and a special Verdict by which it was found that the Defendant promised to see the Plaintiff contented, that which the above named E.C. should deal with the Plaintiff, for the use of the said Defendant any way. The Judgement of the Court was that the Verdict did not maintain the Declaration, because for collaterall matters which are not Duties, a Request is material, and are not like a Duty as for Debt, which is due, and no Day of payment expressed, that shall be alleadged to be when he shall be thereunto requested generally. For

*For collaterall matters which are not Duties, a Request is necessary.*

if

if I sell my Horse for ten pounds, and no Day of payment, that shall be alleadged in the Count, *Cum inde requisitus esset*. And one case of *Peters* was cited, which was grounded upon a promise made in this manner, Marry my Neice, and when I come from *London* I will give you 100*l.* and the Action was brought in this manner, *Videlicet*, in consideration that he would marry, *A.* promised to pay the Plaintiff 100*l.* after he returned from *London*, when he was thereunto requested: and for these words, when he was thereunto requested, the Action was maintainable.

The word  
Witch will not  
bear an Action.

**H***Inch* versus *Heald*, *Trin.* 17. *fac. rotulo* Action upon the case for these words, *Videlicet*, He is a Witch, and hath bewitched me: and the Court held the Action would not lie, for he might bewitch him by fair words, or fair looks.

An implied  
promise where  
it is upon the  
reality will not  
lie, except upon  
a collateral  
cause.

**G***reen* versus *Harrington*, *Trin.* 17. *fac. rotulo* 953. The Plaintiff declares that the Defendant such a Day was indebted to the Plaintiff in 10*l.* for Rent due to the Plaintiff for one year ended at *Michaelmas* then last past, for divers Lands in *H.* demised to the Defendant by the Plaintiff, the Defendant in consideration thereof promised to pay the Plaintiff the said 10*l.* when he should be thereunto requested. The Defendant pleads *Non assumpsit*: and after Verdict given for the Plaintiff it was moved in Arrest of Judgement, that there was no consideration to maintain the Action, because an Action of Debt lay upon the first Contract being in the realty; for upon an implied promise no Action will lie where it is in the realty, except there be a special promise made upon a collateral cause, *Videlicet*, If the Plaintiff had threatned suit for the said 10*l.* and the Defendant, in consideration that he would forbear to sue, promises to pay, &c. and the like: for if a man be bound in a Bond to pay money, and the Day past, now an Action of the case will not lie for that money, except there be a collateral promise: and so in the like cases: and Judgement was given against the Plaintiff.

An Indebitar.  
assumpsit for  
money ruled,  
good without  
expressing for  
what.

*Michaelmas* 17. *fac.* It was adjudged in the Kings Bench in an Action upon the case, *Videlicet*, whereas the Defendant was indebted to the Plaintiff in 10*l.* (without expressing the cause for which the Debt grew due) the Defendant in consideration that the Plaintiff at the special instance and request of the Defendant, then and there had given Day to the Defendant, untill a time to come, to pay the money, the Defendant promised to pay the money, that the Action was maintainable, without expressing the cause for which the Debt was.

*Hill.* 17. *fac. rotulo* 2722. Action of the case brought for these words, Thou art a perjured Knave, and I will make thee wear Papers for it: the Defendant justifies the words, and shews that the Plaintiff

was

was a Church-warden, and took his Oath to exercise that Office ; and whereas one Article made, was, that he should present whether the Church-yard was repaired or no, and he knowing it, did not present it.

Action of the case brought for these words, Thou art a scurvy perjured Knave ; the Action will lie.

**W**ilson versus Sheriffs of London, Hill. 17. Jac. rotulo 3069. The Plaintiffs declare upon an escape made upon a *Capias ad respondendum*, after the Defendant was arrested : the Defendant pleads a Custome in London, that the Maior and Sheriffs of London have used to enlarge Prisoners that were arrested, in coming, and returning from their Courts, having Causes there depending ; and set forth a Plaint in London against the Defendant, and that he was arrested, and appeared, and pleaded to Issue ; and as he was coming to the Court to defend that Action, he was arrested, as is supposed, in the Action upon the case brought against the Sheriffs ; and shew that he was brought to the Court, and enlarged by the Court : and the Court held, that if a man were arrested in the face of the Court, the Court might discharge him, otherwise not.

Action against the Sheriffs of London for discharging one who was arrested, coming to defend a suit depending there. The Court cannot discharge one arrested, except he be arrested in the face of the Court.

**P**ain versus Newlin, Mich. 16. Jac. rotulo 3042. Action upon the case brought upon a promise and Judgement, by *Nihil dicit* : and at the return of the Writ to inquire, the Defendant moved in Arrest of Judgement, and shewed that the Day of the promise was supposed in the inquiry to be, Anno Domini 1614. And in the Declaration it was made 1617. and for that variance, Judgement was stayed.

Judgement stayed for variance between the Count and Writ to inquiry.

**B**elcher versus Hudson, Hill. 6. Jac. rotulo 132. The Plaintiff declares, that in consideration that the Plaintiff at the request of the Defendant would marry one *T. M.* his familiar Freind, the Defendant promised to pay the Plaintiff yearly after the Decease of the said *T. M.* 40*s.* for her maintenance : and the Plaintiff avers the Marriage, and that she survived. The Defendant pleads that the said *T. M.* in his life time after the Marriage, &c. did release to the Defendant all Actions as well real as personal, and all Demands and Challenges whatsoever, from the beginning of the World unto the Date thereof : to which Plea the Plaintiff demurs, and adjudged a naughty Plea.

Release by the Husband, pleaded in Bar to an Action brought by the Wife after his Death, for money to be allowed her after his Death, and adjudged no Bar.

**B**ox an Attourney against Barnaby. Action upon the case for these words, *George Box* is a common maintainer of suits, and a Champertor, and a Plague of God consume him, and I hope to see his Body rot upon the Earth like the Carcase of a Dog, and I will have him thrown

Action for calling an Attourney Champertor.



thrown over the Bar next Term, and I will give a Beech to make a Gallows to hang him : and Judgement given for the Plaintiff, for this word Champertor, and no other.

*Trin. 14. Jac.* Action upon the case for these words, She is an arrant Whore, and had two Bastards in *Ireland* : and Judgement by the whole Court, that the words would not bear an Action.

**Y**ork versus *Cecill, Mich. 14. Jac.* Action upon the case brought by *A. Tanner* for these words, Thou art a bankrupt Knave : and the Court held that the Action would not lie : but *Quare*.

The Roll mentioned after the Record was certified by Writ of Error, it being the Clarks misprision.

**S**kais versus *Nelson, Mich. 12. Jac. rotulo 1106.* Action upon the Case brought for words against Husband and Wife, spoken by the Wife, and Judgement was entered for the Plaintiff, and in entering of the Judgement it was made, *Et prædicta E.* (being the Woman) *in misericordia*, which was naught, for it should have been both the Husband and Wife *in misericordia* : and after the Record was certified by Writ of Error; Serjeant *Richardson* moved that it might be amended, because the Judgement Papers were right, and so it was ordered to be amended according.

He is a forging Knave, spoken of an Attourney actionable.

**S**mails an Attourney versus *Moor, Hill. Jac. rotulo 753.* Action S upon the case for the words, He is a forging Knave: and the Court held that the words were actionable, for he alleadged in his Declaration, that he was an Attourney of the Common Pleas, and so being touched in his Profession, the words would bear an Action : and if a man said of a Bishop, that he was a Papist, the Action would lie ; because Religion is his Profession, and so he is defamed.

Implied words will not beare an action.

**S**teward versus *Bishop, Trin. 14. Jac. rotulo 769.* Action upon the Case for these words, *James Steward* (meaning the Plaintiff) is in *Berwick Gaol* for stealing of a Mare and other Beasts : and after a Verdict for the Plaintiff, it was moved in Arrest of Judgement, that the words were not actionable, and so it was adjudged, for that he did not directly say, the Plaintiff was a Thief, but onely implied,

Trover brought by Administrator, as of his owne goods, and adjudged good.

*Hill. 15. Jac. rotulo* An Exception taken to a Declaration in Trover brought by an Administrator, because he declares, that whereas he was possessed of divers Goods and Chattels, as of his own proper Goods, and should have said, as was pretended, as of the Goods and Chattels of the intestate at the time of his Death ; but the Exception was over-ruled by the Court.

Exception to an Action of the case brought, and the Plaintiff declares, that whereas the Plaintiff had delivered the Defendant *unum statum salis Anglica*, a Bushel of Salt, pretending that (*statum*) had

and

another proper signification, but because it was shewed to the Court that (*statum*) by one Dictionary was *Latine* for a Bushel; Judgement was given for the Plaintiff.

In Trover it is usual to prove no more, but that you requested the Goods, and the Defendant refused to deliver them, this is a Conversion. When a Justification arises upon a Sale, then I need traverse no more but the place alledged, and not go to the whole County, but where it is a transitory, Trespass, as for Battery, taking of Goods, and the like, then the whole County must be traversed.

*Demand and demall makes a Conversion.*

**C***Atford* versus *Osmond*, Mich. 16. Jac. rotulo 1063. Action of Trover brought for two Steers, the Defendant being an Attourney of the Common-pleas justifies the taking as Under-sheriff, by reason of Process from the Exchequer to levy of the Occupiers of the Lands of divers persons in a Schedule in the said Writ named the Debts therein specified, and doth not recite the Schedule; and he being Under-sheriff took the Steers in the Land of the Plaintiff, which was lately one *Stones*, who was Debtor to the King in 59.s. being behinde upon the Land: and Exception was taken, for that it was not directly alledged that the Land such a Day was the Land of the said *S.* The Writ commanded to levy the summs in the said Schedule mentioned; and if they could not, to take their Bodies; and it was adjudged a good Warrant to levy of the Occupiers of the Lands that were the said *S.* 59.s.

*The Sheriff justifies by virtue of a Process out of the Exchequer, to levy of the Occupiers of S. Lands 59.s. arrears upon the said Lands.*

**C***oles* versus *Flaxman*, Hill. 14. Jac. rotulo 2175. Action of the case brought for disturbing the Plaintiffs Common. The Defendant pretends Title to the Common by reason of Common appurtenant to certain customary Land, of part of which he conveys a Title to himself, but not of the whole: and the Question was, whether it were Common appurtenant, or appendant? and if appurtenant it could not be divided.

*Common appurtenant cannot be divided.*

**K***Eymes* versus *Moxham*, Trin. 15. Jac. rotulo 559. Action of the case brought for a promise made at *C.* for the Delivery of a Mare, which the Plaintiff delivered the Defendant to plow his ground in *P.* And shews the Defendant did so excessively and immoderately labor and work the said Mare, that the Mare died. The Defendant confesses the promise, and that the Mare at the time of the Delivery was infirm, and that he worked her moderately, and traverses the excessive labouring of the Mare: and after a Verdict, it was moved in Arrest of Judgement, that it was mis-tried, because the Venn was of *C.* which was naught, and there was no place alledged where the excessive labouring was; for the Venn ought to come from that place where the laboring was.

*Mis-triall, the Venn being mistaken.*

Judgement arrested, for a mistake of the Jury.

**H**Arbin and his Wife *versus* Green, *Trim.* 14. *Jac. rotulo* 2263. Action upon the case brought for not grinding his Corn at the Plaintiffs Mill, and shews that the Bishop of *Salisbury* was seised of four customary Mills, called *A.* in his Demesne, as of Fee in right of his Bishoprick, and prescribes that all Inhabitants and Residents within the City of *Salisbury*, holding any ancient Mesuages of the said Bishop in right of his Bishoprick, were time out of minde used, and ought to grinde all their Corn whatsoever spent in their houses, or exposed to sale in the said City, at the said Mills, of the said Bishop, and no where else, without the licence of the said Bishop, and to pay Toll therefore to the said Bishop, his Successors Bishops, or their Farmers for the time being; and in consideration thereof, the Bishop, his Successors, or Farmers for the time being of the said Mills, time out of minde have been used and accustomed at their own charges, from time to time to keep and maintain a Servant expert in grinding, as well by night as day there attending, to grinde their Corn as soon as conveniently might be; and the Plaintiff shews that such a Day the Defendant was, and yet is, an Inhabitant, in one ancient Mesuage in the said City, held of the Bishop, and so possessed, intending to deprive the Plaintiff of the profit of his Mill, did such a day grinde divers sorts of Corn in other Mills, without the Bishops leave, to his damage of, &c. The Defendant pleads *Non cul.* The Jury finde the Defendant guilty for a longer time, then the Plaintiff had interest in the Mill, and gave Damages intire, and upon a Motion in arrest of Judgement adjudged naught.

In consideration of the Plaintiff would agree, the Testators son should marry the Plaintiffs daughter, adjudged a good consideration.

**G**resley *versus* Lotter and his Wife Executrix of *R. B.* and declares that communication was had between the Testator in his life, and the Plaintiff concerning a Marriage to be had and solemnized between one *T. B.* son and heir apparent of the said *R. B.* and *Jane* Daughter of the Plaintiff, and heir apparent of *John F.* deceased, the said Testator such a Day and Year in consideration that the Plaintiff at the special instance and request of the said *R. B.* then and there would agree that the said *T. B.* should marry the said *J.* promised to pay 20. *l.* and adjudged a good consideration.

**G**onland *versus* *Mason Hill.* 17. *Jac. rotulo* 2263. Action of the Case for these words, I charge him with Felony for taking of money out of the pocket of *Henry Sparry*, and I will prove it: and the Court was divided in opinion, whether the words would maintain an Action or no.

**S**mith and his Wife *versus* *Stafford* Executor of *Stafford, Hill.* 15 *Jac. rotulo* 206. Action of the case brought upon a promise made



to the Woman when she was sole, in consideration the Woman would marry the Testator, he promises that if the Woman should over-live the Testator, that then he would leave her worth 100*l*. and they averr that she did marry him, and after the Husband died, and did not leave her worth 100*l*. and the Defendant pleads *Non assumpsit*, and found for the Plaintiff: and it was moved in Arrest of Judgement, that by the Inter-marriage the Promise was drowned, and released. Three Judge for the Plaintiff, and one for the Defendant.



*The like Observations in Actions of Covenant.*

**D***Rury* versus *Allen, & al.* Mich. 6. Jac. rotulo 926. Action of Covenant brought against Administrators. The breach was, for not repairing Houses by the Administrators, according to a Covenant made by the Intestate. The Administrators plead divers Judgements given against them in Bar of the Covenant, and that they have not Assets over.

**H***Are* versus *Savill*, Trin. 7. Jac. rotulo Action of Covenant brought upon an Indenture, upon a special Covenant to pay Rent at certain Dayes therein specified and reserved. The Defendant pleads that no Rent was behinde. The Plaintiff demurs to that Plea: and it was held by the whole Court to be a bad Plea in Covenant; for by that Plea the Defendant confesses the Covenant broken, and that Plea tends but in mitigation of Damages.

*Rents arrears,  
no Plea in  
Covenant.*

**M***Ordant* versus *Wats*, Pasch. 17. Jac. vel 7. Jac. rotulo 1532. Action of Covenant brought for a Rent-charge granted for the life of an Estranger, and for half a Year after to be paid at the Feasts of the Annunciation of the Virgin *Mary*, and Saint *Michael* the Archangel, and alledge that the Estranger died in *February*, and that the Rent was not paid at the Feast of the Annunciation, and so the Covenant broken: the Defendant demurres, pretending that the Rent was not due untill half a year after the Death of the Estranger, and not at the Feast, but the Court held the contrary. And if the Grantee had died, his Heirs should have had it, during the Life of the Estranger, because it was payable to him, his Heirs and Executors. If I grant an Annuity for Life, and twenty years after, these are two severall Grants, and the Executor shall have it after the Death of Tenant for Life. And Sir *Edward Cook* said, When an expresse Covenant is made to pay the Rent at divers Dayes, an Action of Covenant will lie before

*Difference be-  
tween Cove-  
nant and Debt  
to bring an  
Action.*

Difference between Covenant and Debt to bring an Action.

all the Dayes of Payment be past; but an Action of Debt will not lie untill all the Dayes be past, and that in such case Debt doth properly lie upon a Grant of an Annuity for life or years, *H. 7. Eliz. rotulo 908.*

Breach assigned in default of the Party that never sealed the Indenture of Covenants.

**L***Am versus Tresham, Hill. 7 Jac. rotulo 2145.* The Indentures of Covenant were made between *T. Tresham* & Lord *Stourton, Meriel, T.* and the Defendant, and the Lord *Stourton* and *Meriel* never sealed the Indenture, and mention thereof was made in the Count, *Videlicet*, which Lord *Stourton* and *Meriel* were parties to the said Indenture, but never sealed. The Case was Sir *T. T.* conveyed one Lease to the Lord *Stourton*, and he to the said *Meriel*, and by the Indenture brought into the Court, it was covenanted, that the said *T. T. M.* and *L.* or one of them at the time of the en sealing and Delivery of the said Indenture, was lawfully possessed of, and in the Mannour of, &c. And covenant that the Defendant, his Executors, and Assignes, might and should quietly have and enjoy the said Mannour clearly and absolutely freed and discharged, or otherwise upon request saved harmless from all Incumbrances and former Bargains by the said *T. S. E. M.* and the Defendant or any of them: and the breach was, that the Plaintiff was damnified, for that the said *M.* that had the State did not seal, and adjudged good.

**P***ot versus Lord Saint-John, Mich. 7. Jac. rotulo 3214.* The Plaintiff had the Reversion of two Houses, one in Fee, and the other for years, and makes a Lease for years, with Covenant for Reparations of both Houses, and Question was, whether the Plaintiff should have one Action, or several Actions, and adjudged that he should have a joynt Action for both.

Covenant lies against the first Lessee upon breach of Covenant made by the Assignee.

**F***isher versus Amers, Hill. 8. Jac. rotulo 1061.* Action of Covenant brought against the first Lessee after he had assigned over his terme for not repairing: and the Question was, if an Action of Covenant would lie against the first Lessee upon a Covenant to repair the Houses, &c. who had assigned his terme to another, whom the Lessor had accepted for his Tenant, and received the Rent, and he suffered the House to be consumed by fire, and if the Covenant by such Acceptance were gone as Debt, for the Lessor is barred of his Action of Debt for Rent against his first Lessee, after he hath assigned, and the Lessor accepted the Rent of the Assignee. If I covenant, that I, my Executors, Administrators, and Assignes, shall pay the Rent, if I assigne over my terme, and the Assignee pay the Rent to the Lessor, yet the Covenant lieth against the first Lessee, otherwise it is where Rent is reserved, and no Covenant to pay it, there, if the Lessor accept the Rent

Difference between Covenant and Debt.

Rent of the Assignee, the Action will not lie against the Executor of the Lessee, and Judgement after a Demurrer for the Plaintiff, that the Action would well lie.

**W***Alter versus Decanum & Capitulum Norwici, Trin. 9. Jac. rotulo 1414.* Action of Covenant brought upon an express Covenant in a voidable Lease; and the Question was, whether the Covenant be good, the Lease being void; and it was adjudged, *Trin. 10. Jac.* that the Action would lie, although the Lease were void: and *Mapes* case was cited, which was, *Mapes* made a Lease of a Parsonage of *D.* for seven years, and did covenant to save the Lessee harmless against *B.* the person, &c. in that case it was held, if the person sue the Covenant by right or wrong, an Action lies upon the Covenant: and *Sir E. Cook* said, that if the Lease were originally void, yet the Action of Covenant would lie; for else a great mischief might happen; for a Dean might as to day make a Lease to one, and keep it secret, and to morrow make another, and covenant to enjoy it, and so avoid the second Lessee. If a Lease be good at the beginning, and become void after, their *terminus*, is the number of years, otherwise, where it was void at the first, if a Dean and Chapter make a Lease contrary to the Statute, and reserve a Rent, it shall not be void against them, so long as the Dean liveth, but against his Successor. The Lease in question was not void, but voidable. A Covenant in Law shall go to lawfull eviction, although the Lease be void. A Covenant real to Warrant and Defend, there must be a Title paramount, and a lawfull eviction. Covenants for Lessees shall be taken beneficially for the Lessees.

Covenant upon a void Lease is good.

**B***Right versus Cowper, Trin. 9. Jac. rotulo 638.* Action of Covenant brought upon a Covenant made by the Merchant with a Master of a Ship, *Videlicet*, that if he would bring his Freight to such a Port, then he would pay him such a summ, and shews, that part of the Goods were taken away by Pirats, and that the residue of the Goods were brought to the place appointed, and there unladed, and that the Merchant hath not paid, and so the Covenant broken: and the Question was, whether the Merchant should pay the Money agreed for, since all the Merchandises were not brought to the place appointed: and the Court was of opinion, that he ought not to pay the Money, because the agreement was not by him performed.

Action would not lie, because if the Covenant was not performed, Piracy is no excuse to perform a Covenant.

**C***Rockhay versus Woodward, Hill. 15. Jac. rotulo 2001.* An Action of Covenant brought upon this Writing, *Videlicet*, *Memorandum* that I *John Woodward* do promise and assunie unto *B.C.* to pay to him such Moneys, or other Goods, as *Josias* my son shall imbestell, mispend,

Judgement arrested for default in the Declaration.

or

or wrongfully detain of his, during the time of his being Apprentice with him within three Moneths next after request to me in that behalf made, and due proof made of such imbeffelling, or wrongfull detaining, in witness, &c. and the Plaintiff shews that the Defendants son did imbeffell Goods of his Masters, and shewed what Goods, and left out in his Declaration these words, *Videlicet*, and due proof likewise made of such imbeffelling or wrongfull detaining. The Defendant demands Oyer of the Writing, and pleads that he did not imbeffell; and it was tried for the Plaintiff, and after Triall Exception taken, because the Plaintiff did not alleadge any proof made, and for that reason Judgement was arrested.

*A Covenant in Law shall not be extended to make a man do more then he can.*

**B***Ragg* Assignee of *Bragg*, versus *Wiseman*, Executor of *Fitch*, Mich. 12. Jac. rotulo 538. Action of Covenant brought, and the case was this, that *Fitch* and his Lady were seised of Land in right of his Wife for terme of her life, and joyn together in a Lease by Deed indented, in which were these words, demise, and grant, and afterwards *Fitch* dieth, the Lady enters, and avoids the Lease, and maketh a new Lease to a stranger, whereupon an *Electione firmo* is brought against the first Lessee, and Judgement thereupon, and the first Lessee put out of Possession: whereupon the first Lessee brings his Action of Covenant against the Executors of *Fitch*, upon the words, demise and grant. The Defendant demurs. The words were, have demised, granted, and to farm letten for years, if the Wife should for long live; and Judgement for the Defendant. A Covenant in Law shall not be extended to make one do more then he can, which was to warrant it as long as he lived, and no longer. The Law doth not binde a man to an inconvenience. If Tenant for Life make a Lease for twenty years, and covenant that the Defendant shall injoy it during the terme, that shall be during his Life, for the terme endeth by his Death; but otherwise it is, if the Covenant be during the terme of twenty years, by the word, Demise, an Action of Covenant lieth, although he never enter, and this word Demise implieth as much as *Dedi & concessi*. An Action of Covenant brought, for that the Defendant covenants to bring again a Ship, Perils and Damages of Sea onely excepted, and he to excuse himself, saith, that the *Hollander* in a warlike manner by force and armes took the Ship: and much doubt was where the Issue should be tried; and the opinion of the Court was, that the Action should be tried where it was laid.

**C***owling* versus *Drury*. Action of Covenant brought, for that the Defendant did not pay a Rent with which the Land was charged; the Defendant replies, he was to injoy the Land sufficiently saved harmless, and answers not the Breach, and adjudged a naughty Bar by the whole Court.

*Selby*



**S**elby versus Chute, Trin. 11. fac. rotulo 3804. Action of Covenant brought, and the Breach was alleadged, that the Plaintiff should quietly enjoy the Land demised to him, and he shews that Chute exhibited a Bill in Chancery against him, pretending the Lease was made in trust, and it was decreed to be otherwise: and whether the exhibiting this Bill was a Breach of Covenant, there being no Disturbance at Common Law, was the Question: and the Court were of opinion, that it was no Breach of Covenant, for it was no Disturbance at Common Law, nor Entry; and the Law could not take notice of it: and Judgement for the Defendant.

*A Suit in Chancery, no Disturbance.*

**H**older versus Tailor, Pasch. 11. fac. rotulo 1358. An Action of Covenant brought upon this Covenant, that the Lessee should repair the House, provided alwayes, and it was agreed that the Lessee should have such necessary Timber to be allowed and delivered by the Lessor: and the Breach was, that the House wanted Reparations, and that so many Loads of Timber were necessary, and that the Lessor allowed them according to the form and effect of the Indenture; and a general Request laid, and Exception was taken to the Declaration, for that the Plaintiff did not alleadge a special request to the Defendant: and that it was laid in the Declaration, that a stranger brought the Timber, which was held to be naught by the whole Court, for it amounted to an Entry upon the Lessees Possession.

*Judgement arrested for defects in the Declaration.*

Exception taken to a Breach laid in Covenant for Repairs, because it was generally alleadged, and not shewed in what, but being after a Verdict it was helped by the opinion of the whole Court.

**T**isdale versus Essex, Trin. 12. fac. rotulo 2131. Action of Covenant brought upon these words, covenant, promise, and agree, that the Lessee should quietly occupy and enjoy the Lands demised, for and during the terme of seven years: and the Plaintiff shews that an Estranger entred upon the Land, and shews not that he entred by Title; and the Court was of opinion that it was naught, because it did not appear that he had a good Title to enter, *Dedit & concessit*, imply a Warranty for Life; and Judgement was given for the Defendant, because the Breach was naught.

*Breach that one entred, and shews not by what Title, and naught.*

**H**icks versus Action of Covenant brought, and the Land alleadged to be in *Weston*, alias, *Weston Underwood*, and the Venn was *de visu de VWeston Underwood*, and it was alleadged by the Defendant, that the Venn was mis-awarded; because it was not of *VWeston* onely, but the Court was of a contrary opinion, that it was well awarded, and Judgement for the Plaintiff.

*Castilion*



**C**astilion & al. versus Smith, Exec. Smith, Trin. 17. Jac. rotulo 1849. Action of Covenant brought against the Defendant, and the breach of Covenant alleadged to be in the time of the Executor: and the Judgement was entred of the Goods of the Testators: the Breach was for plowing of Land contrary to Covenant.

**R**ident versus Took, Hill. 13. Jac. rotulo 3516. Action of Covenant brought to discharge the Plaintiff of a single Bill, in which he was bound for the Debt of the Defendant, and he alleadges for Breach non-payment, and a Suit and recovery at Law for the Money which remained in force. The Defendant pleaded, that he paid the Money at the Day, and thereof gave the Plaintiff notice, before the purchasing his Writ, the Plaintiff demurs; and the Court held the Plea naught, and Judgement for the Plaintiff.



*Actions upon Account.*

Release cannot be given in Evidence upon a Plea, that the Defendant was never a Receiver of the Plaintiffs Money.

In Account the Proceß are sum. Attaint and Distress. In Account two Judgements, and upon a Nichil Proceß of Utlary lies.

**W**illoughby against Small. An Action of Account brought against the Defendant, as Receiver of the Plaintiffs Money. The Defendant pleads, that he never was Receiver, where he hath a Release from the Plaintiff, whereby he shall lose the benefit of his Release, for that he cannot give that in Evidence upon such Issue.

The Proceß herein is *Summons Pone & Distress*, and upon a *Nichil* returned upon the *Summons pone*, or *Distress*, the Outlary lies, the Proceß is returnable from fifteen Dayes to 15 Dayes, & an *Essoin* lies.

In this Action there are two Judgements, the first Judgement is, that the Defendant shall account, because he hath not accounted before in this first Judgement, the Plaintiff shall not recover Costs or Damages, but a *Capias ad computand.* shall issue, and if a *Non est inventus* shall be returned thereupon, then an *Exigent*: and when the Defendant by the rigor of the Law is imprisoned, yet the Court doth in favour of the Defendant take Bail, for he shall account before Auditors, which the Court shall appoint, which shall be the Officers of the Court to audit the Account; and he shall appear from day to day before the Auditors at every day and place assigned by the Auditors, untill the Account shall be determined; and before the Auditors the Plaintiff or Defendant may joyn Issue or demurr upon the Plea pleaded before the Auditors, and if any of the parties shall make Default, and shall not appear, then if after Appearance the

De-

Defendant shall not plead, or if he shall joyn Issue, or joyn in a Demurrer, the Auditors shall certifie that to the Court, and the Court shall proceed to the matter certified by triall of the Issue, if it be joyned, or by arguing the Demurrer as the cause shall require: and if the Plaintiff shall make Default, or shall not prosecute, or if the Defendant shall not answer, they may commit him to the *Fleet*; and if Verdict pass for the Plaintiff Costs and Damages shall be recovered, by reason of the inter-pleadings; and the Plaintiff shall recover his Goods or Moneys demanded, with his Costs and Damages; and a *Fisa*, or *Elegit* or *casa*, shall be awarded, and if a *Non est inventum* be returned, then an Outlary after Judgement.

An account against a Bailiff of Lands shall be brought in the County where the Lands lie.

*Account against a Bailly local.*

In every case in account where an Attachment may be returned, an Essoyn lies.

Where the Defendant is charged to account for Moneys received from the hands of the Plaintiff, the Defendant may wage his Law, and likewise for Goods delivered to be sold, but it is otherwise where the Receipt is by the hands of a Testator, or of any other then the Plaintiff.

*The Defendant may wage his Law if the Receipt be per manus proprias.*

That after a year and a day after Judgement given, every Action shall be revived by *Scire facias*, which is given by the Statute; for all Actions at Law, if the Plaintiff shall not obtain his Execution within a year and a day, he shall be driven to bring a new Action.

*Nota.*

Or if a Defendant be charged as Receiver by Indenture, he shall not be admitted to plead, that he was not a Receiver.

If the Plaintiff die before the second Judgement, the Writ shall abate, and no *Scire facias* lies for the Executor, if the Defendant die before the second Judgement.

*In Account the writ abates the Death.*

If two be adjudged to account, and a *Ca. & exsa.* issue, and one appear, and the other be outlawed, he that appears shall account alone, for that the Plaintiffs Process is determined against the other: and so if one die, the other shall account alone; and if one be adjudged to account, and will not, he shall be committed to the *Fleet*.

That if I deliver Goods to one, to the value of 100*l.* to traffique with for my use, and he sels them for 10*l.* I have no remedy, but if my Bailiff buy a thing for 10*l.* which is not worth it, he shall not be allowed it.

*Nota.*

Account lies not before a Sheriff, for that he can assigne no Auditors.

*Nota.*

If two be joyntly posselt of Goods, one of the two deliver the Goods for Merchandise, he onely shall bring the Action.

An Account lies not against an Executor or Infant.

*Nota.*

Matter in discharge of the Actions shall not be pleaded in Bar.

An Account lies not for a Park of Deer.

Matter that is in discharge of an Account shall not be pleaded in Barr of the Action, for the Judges are Judges of the Action, and not of the Account.

If Money be delivered to render an Account, (an Account lies) but if it was delivered to keep untill the Plaintiff shall require; Account doth not lie, but Detinue.

Nora.

If the Plaintiff account upon Witness of the Receipt, the Defendant shall not wage his Law.

Nora.

If an Account shall be brought for Goods, in the Declaration the Plaintiff declares, that they were in his house, whereas indeed they were not, it is good.

Judgement in Account is on a special Verdict.

**H**Arrington versus Dean, Hill. 10. Jac. rotulo 3230. Action of Account render brought against the Defendant for the Receipt of Money by the hands of one *Rotheram* for 200*l.* The Defendant pleads that he was not a Receiver for to render an Account: the Jury finde it specially that *Rotheram* was indebted to the Plaintiff in 200*l.* and the Plaintiff required the Defendant to receive the said 200*l.* and the Defendant required *Rotheram* to pay the 200*l.* and *Rotheram* upon Request to him made, desires the Defendant to borrow of any person 200*l.* and to pay the Plaintiff, and finde that the Defendant did borrow 200*l.* of one *Stanhope* to pay the Plaintiff; and *Rotheram* became bound to *Stanhope* for the payment of the said 200*l.* and that the Defendant appointed his Wife, to pay the Money to the Plaintiff; and if upon the whole matter, &c. and Judgement was given, that the Defendant was a Receiver.

Misprision of the Clerk amended after Verdict.

**T**He Earle of *Cumberland* against *Hilton*. The Clerk that entred the Cause had omitted the Charge which was for 400*l.* and it was omitted in the Roll, and *Notis prins*: and after a Verdict, Exception taken, and amended by the Court.



### Affise.

No Tenant at the time of the writ purchased, nor afterwards, and if, &c. no Disseisin.

**I**N an Affise Trin. 29. Jacobi, rotulo 27. brought against *Thacker* and *Elmer*: the Defendants come and say, that there was no Tenants of the Tenements put to the view of the Recognisors of the Affise aforesaid, nor at the time of purchasing the Writ, to wit, such a Day, nor any time after; and this they were ready to verifie, and

and pray Judgement; and if so, then they say, that they have done no injury or Disseisin of the Tenements with the appurtenances to the said *W. T.* and put themselves upon the Assise; and the said *W. T.* doth so likewise, therefore the Assise was taken between them; and thereupon the Recognisors of the Assise say, that the said *E. E.* at the purchasing of the original Writ of the Assise, *Videlicet*, such a Day were Tenants of the Tenement aforesaid, with the appurtenances, as of his Free-hold; and that the said *W. T.* was seised of the Tenements aforesaid, with the appurtenances in his Demesne, as of Fee untill the said *E.* did unjustly, and without judgement disseise the said *VV.* but not by force and armes; and assess Damages to 12*d.* and for Costs 6*d.* and Judgement given that the said *VV.* should recover his Seisin of the Tenements aforesaid against the said *E.* by the view of the Recognisors of the Assise, and his Damages, &c.

An Assise brought, and the Grant was of the Herbage and Pannage, &c. and whether this were good or no: some held it void, for the incertainty of the Grant, when it should begin; Sir *Edward Cook* held the Grant good; for if the King make a Lease for Life, and granteth the Land without reciting the State to one for life, this is a good Grant for Life of the Reversion, to begin immediately after the Death of the Tenant for Life.

*Note upon the Kings Grant.*

*Trin. 7. Jacobi, rotulo 35.* An Assise brought for the Office of a Harald, at the Funeral of the Earle of *Exceter*; and the great Question was, where the view should be made; and it was alledged, that it should be made in the place where he exercised his Office, but the Court doubted of that; but they were examined of the view made in the Abbey of *Westminster*, being the place where the Funeral was performed; and the Court were of opinion, that in Dower, where Tithes are demanded, no view lies, for of things that are invisable, no view lies, but the Tenant in such case shall be denied it.

*View to be there where the Office is performed.*

*Mr William Saint Andrew* brought an Assise *de Darrein Presentment*, against the Arch-bishop of *Tork*, the Countess of *Shrewsbury*, and *F. H.* for the Church, of *O.* in the County of *Nott.* The Arch-bishop and *H.* appeared, and the Countess did not appear; and though the Countess made Default, yet the Assise was not taken against her by Default, but a re-summons was awarded against the Countess, and the same Day given to the Arch-bishop, and *H.* and a *Habeas Corpora* against the Recognisors. And note, the Tenants that appeared pleaded in abatement, that a Writ of *Quare impedit*, for the said Church was hanging in such a Court between the same parties, and the Assise was brought afterwards: and with this agrees the Register; and it was adjudged a good Plea. The Writ was returned in this manner, *Pleg. de prosequend.* *John Doo, Richard Roo.* The within

*Another Writ brought, and hanging, a good Plea in abatement.*



named Arch-bishop and Countess are attached, and either of them is attached, *per Plag. H. S. N. 7.* And the within named *H.* hath nothing in the Sheriffs Bailiwick, by which he may be attached, nor hath a Baili within his Liberty, nor is therein found : and the residue of the Execution, &c. and Judgement given, that the Writ should abate : and the like was in the Earle of *Bedfords* case, where two *Quare impedit*s were brought one after another, and the last Writ abated.

*Assise taken by default against Harvey, and the other Tenant pleaded in abatement of the Assise, that there was a Quare impedit depending.*

**J** Lovelace versus *Baronissam Despencer, & R. Harvey Clericum, Trin. 12. Jac. rotulo 74. de Darrien* Presentment for the Church of *M.* And the said *H.* being solemnly exacted came not : and the Sheriff made a Return, that he was summoned by *J. O.* and *W. C.* and therefore the Assise was to be taken against him by Default, but the said *Baroniss.* by *T.* her Attourney, saith the Assise ought not to be so taken, and confesses the said *J.* was the person last presented, but conveys a Title to her self of the Mannour : to which the presentation belongs, and that being so seised, the Plaintiff in the Assise by usurpation presents the Clerk in the Count, whereupon the Defendant brought a *Quare impedit*, and hanging the Writ, the Clerk in the Count dies, and the Plaintiff presented the Clerk that made Default, who by vertue of that presentation is yet Parson of the said Church, by which she is seised of the Advowson, as in her former Estate ; and so she saith, that the Presentation of the said *J.* by the said *L.* made, ought not to prejudice her : and a Demurrer upon this Plea ; and that the Assise should remain to be taken, &c. for want of Recognisors ; and the Sheriff was commanded to distrain them, &c. and Judgement given, that the Plea was good : but *quere* of the Declaration, whether sufficient, because it was not alleadged, that he that presented was seised of the Advowson.

Nota.

*Pasch. 8. Jac. rotulo 31.* An Assise brought for the Office of Clock-keeper of, and it was held, that it must be an ancient Office, and because they could not prove that it was an ancient Office, the Plaintiff was non-suit, and the Plaintiff shewed a Grant of the same in *E. 6.* time, but that was held no ancient time.

*The King can not create an Office to the Queen, who may bring an Assise.*

*Pasch. 6. Jacobi.* It was held by the whole Court, that an Assise of *Sadler* to the Queen would not lie, being granted to one by the King, but was held void by the whole Court, for the King cannot make an Officer to the Queen, and by the Patent no place was expressed where he should enjoy and exercise his Office, and take the Profits, and therefore the Jury could not have the view ; and for that cause an Assise cannot be taken : and if the King should grant the Office of Usher to his Son the Prince, an Assise would not lie.

An Assise brought against *Demetrios*, the Plaintiff was non-suit ;  
and



and *Demetrius* moved to have Cost, and it was denied by the whole Court, because an Assise is not within the words of the Statute.

No Costs in a non-suit in Assise.



*Audita Quærela.*

**B**ird versus Kirton, Trin. 13. Jacobi, rotulo 3118. An *Audita Quærela* brought, and the case was this, Bird and Milles were bound to Kirton, and Kirton makes a Bond to Milles in the sum of 100*l.* that if Milles be not sued upon the first Bond, then that shall be void; and it was alleadged, that Kirton did both sue Milles and Bird, and that he had no notice of the second Bond, that he might have pleaded it, and so pretends that the second Bond should be a Defeasance of the first; and Judgement was given for the Defendant.

**B**eck brought an *Audita Quærela*, and surmises the matter following, that Boon Administrator of C. brought his Action of Debt upon an Obligation, and before Judgement, that Administration was revoked, and Administration granted to another, and notwithstanding the Revocation, he procured Judgement, and the second Administrator released, and the rest brought an *Audita Quærela* upon that Release, and the Court would not grant a *Superedeas*, because the Revocation was but matter in fact, for that Revocation was not under Seal; and the first Administrator might appeal.

The Court was denied a *Superedeas*, the surmise being onely matter in suit.



*Cases in Law, and Notes.*

**I**F a Writ of Covenant be brought against two, and if one acknowledge the Fine before one of the Justices, and the other acknowledge by *Dedimus*, or before another Justice, that Fine cannot be proceeded upon these two acknowledgements by the opinion of the Court.

Nota.

A Writ of Covenant was brought against three men, and their Wives, and onely two men and their Wives acknowledged the Fine, and the other Husband and Wife never acknowledged, and the Fine was sued, as a Fine acknowledged by all, and it was desired the Fine might

A writ of Covenant brought against more then acknowledged, and prayed to be amended, and denied.

might be amended, and the Man and Wife that did not acknowledge might be put out, but the Court would not grant it.

Lease made to one during the life, two if one die the Lease is ended.

If I make a Lease for years, reserving Rent, during the Life of *A.* and *B.* if one of them die, the Rent is gone. If I make a Lease for Life, reserving a Rent to me and my Executor, neither the Executor nor the Heir shall have the Rent, Justice *Walmesley* held this difference in making a Lease to two, during their Lives, if one die, the other shall have it; otherwise it is if it be made to one during the Life of two, and one of them die, in this case the Lease is ended: and there is difference between a reservation of Rent and Lease, for Reservation is according to the will and pleasure of the Lessor; and Justice *Walmesley* said, if a Lessee for years granteth a Rent to *A.* during the Life of *B.* and *C.* this Reservation is good, although one should die, which Sir *Edward Cook* denied: and Judgement was given for the Plaintiff, in *Hills* case.

Nota.

If I make a Lease for years, reserving a Rent, and then I grant, demise, and to farm let, *Reversionem domus*, for years, and the Rent, to have and to hold the Reversion, and the Rent from a time past, if the Lessee cannot get an Attornment, yet it is a good Lease in Reversion, and shall take effect after the end of the first Lease *habendum terram & habendum reversionem est terra revertens*, and no difference.

A case of Joyn-ture.

If the Husband with his own money purchaseth for his Wives Joyn-ture, Land to them and the Heirs of their two Bodies, the Remainder in Fee to the Wife, and they have Issue two Sons, and the Husband dieth, and the Wife suffereth a Recovery to the use of the youngest Son, the eldest Son notwithstanding shall have the Land, by the Statute of Joyn-tures.

Nota bene.

*Hill. 6. Jac.* If I set out my Corn, and after take it away, the Parson may sue me in the Spiritual Court, or bring an Action of Trespass against me: but if the Parson sue in the Spiritual Court a stranger for taking away the Tithes which were set out, this is a *Premunire* in the Parson.

Difference between Tenant at will and sufferance.

Tenant at will shall pay his Rent when he holdeth over his terme, but Tenant at sufferance shall not pay any Rent, if a man hold over his terme, and pay his old Rent, he shall be accounted Tenant at will.

Joyn-t Debt and Contract cannot have several Pleas.

For one joyn-t Debt, for one Contract, you cannot plead *Nil debet*, for part, and demur for the rest; for he pleads *Nil debet*, and the matter in Law is reserved.

Nota.

*Licet sapius requisit*, is a sufficient Request upon a Bond, because it is a Debt.

Nota.

Unto an Action brought against a man upon a Bond, pleads *Denis age*: the case was this, that when the Obligation was sealed and delivered,

vered, the Defendant was of full age, but at the time when the Bond bore Date, he was under age; and at the Assises the Judge there ruled, that at the time of making the Bond, was when the Bond was sealed, and not when it bore Date.

The Court were of opinion, that where a Bishop holds Land discharged of Tithes, and he makes a Feofment of the Land, the Feoffee shall be discharged of Tithes; and the like, if the King hath ancient Forest-land discharged of Tithes, and the King grants this Land, the Grantee is discharged of Tithes; and it is a general Rule, that he which may have Tithes, may be discharged of Tithes.

Nota.

If I let Land for years, reserving Rent, if I command one to put his Cattle into the Land, I cannot distrain them, for my commandment is a wrong, and an Action of case will lie against the commandor.

If I command one to do a Trespass, an Action will lie against him.

If I make a Lease, and bid the Tenants cut down the Trees, yet I may have an Action of waste against my Lessee. In Sir *Cheydens* case, the commandment to take Possession was void, unless he had commanded him to expell the Tenant, and then he might joyn either to distrain, or bring an Action of Debt, for the Lease was made by him and two more.

28 H.8. If I make a Lease to the Husband and Wife, covenant to do no waste, or repair Houses, and the Husband dieth, and the Wife surviveth, and holdeth in, if the Wife commit waste, or not repair the House, no Action lieth against the Wife; but to such a Lease the Wife is tied to pay the Rent, or to perform a condition made by the part of the Lessor, but not observe or perform Covenants of the Lessee.

Wife not bound to perform Covenants of the Lessee.

*Pasch. 10. Jacobi.* The Court much doubted, whether one that had a Park, and was used to pay one Shoulder of Deer for all manner of Tithes, and the Park is dis-parked, should now pay Tithes in kind or not.

Nota.

For Wooll and Lamb, no Action upon the Statute for not setting out of Tithes, for they are no predial Tithes: and no Action lies upon this Statute for small Tithes.

No Action for small Tithes.

An Administration granted *durant minori etate execut.* is not within the Statute of 21 H.8. And by the Civil Law the Judge may after Administration by him granted, revoke it, and grant it to another. And if an Administration be granted to a *Feme Covert*, yet she shall sue in their Court as a *Feme sole*. One *Briessly* married an Administratrix, and entred into Bonds for the Intestates Debts; and afterwards the Wife leaveth her Husband, and refuseth the Administration, and it was granted to another, and now *B.* prayeth a Prohibition, for that he may be sued for Debts, and denied by the Court, untill he be sued. This Administration was first granted by Doctor *B.* and after by him revoked, and a new granted by him to the Wives

Administration granted during minority not within the Statute 21 H.8.

Brother

Brother, and afterwards he revoked that, and established the first Administration and the Appeal.

A Feofment in Fee by Deed indented, Rent reserved, it is good; but without Deed cannot reserve Rent.

Nota.

If Land be devised by three, upon condition to pay them 100*l.* equally to be divided, and one of them dieth, his Executor, or Administrator shall have the Money: and so it is, if one were bound to pay Money.

Ordinary cannot make a Divident of themselves.

The Commissary granted Administration of the Intestates Goods to the Wife, and did make a Divident of his Estate to some of the rest of his Kindred: and this was held not to be warranted by Law, and more then the Ordinary could do; because the Administratrix is chargeable to pay all Debts and Promises of the Intestate, and to bring up his Children, which she cannot do, if the Goods be taken away; *Ubi delinquit ibi punietur.*

If a Copy-holder of Inheritance accept a Lease for years of his Copy-hold, the Copy-hold is gone by the opinion of the whole Court.

Legacy of Land shall not be sued for in Court Christian.

If a Legacy be granted of Land, this shall not be sued for in the Spiritual Court; but if one by Will devise Land to be sold for payment of Legacies, this shall be sued for in the Spiritual Court by the opinion of the whole Court.

Nora.  
For Tithes.

If two Fulling-mills be under one Roof, and a rate-tithe paid for the Mills, and after you alter these Mills, and make one a Corn-mill, your Rate is gone, and you must pay Tithes in kinde; or if you have but one pair of Stones in your Mill, and pay a Rate for them, then if you put on another pair of Stones, new Tithes must be paid in kinde.

Nota.

If one in Fee make a Lease for Life, and after granteth a Rent-charge, if the Grantors Cattle come upon the Ground, I may distrain them, although I cannot distrain the Tenant in Possession, but the Grantor cannot avoid it. If the condition of a Bond be to discharge a Mesluage of all Incumberances, then one may plead generally, that he did discharge it of all Incumberances; but if it be to discharge it of such a Lease, then I must shew how.

Nota.

If a man devise his Trees to his Executors to pay his Debts, the Executor must in convenient time cut down the Wood. And so if a man sell his Trees, the Vendee must sell them in a convenient time.

Recitall shall not enlarge the Grant.

If I grant you out of my Mannour, 10*l.* per ann. and recite but five pounds, the Recitall shall not diminish the Grant. And so if I grant you ten pounds out of my Mannor, and recite 20*l.* this shall not enlarge it.

If I infeoff two of Land, *habendum* to me in Fee, and *habendum* to the other in Fee, they are Tenants in common.

the



In the Court of Wards, one *Dymack* was a Purchasor by Bargain and Sale, and before inrolment *D.* dies, and after his Death the Indenture was inrolled; the Question was, whether his Son shall be in Ward for the Land; and it was adjudged, that he is Heir to the Land, and is in by the Statute of 27 *Eliz.* of Bargains and Sales, and not by the Statute of Uses.

My Lord *Hobard* held, that if an Executor pay a Bond made upon a usurious Contract, it shall be a *Devastavit* in the Executor: and if he be bound to present one to a Church, and he present one upon a Simonaical Contract, the Bond is broken.

Nota.

Money paid by an Executor upon a usurious Contract is a Devastavit.  
Proportionment of Rent.

*Hill. 10. Jac.* Resolved, if one make a Lease of a Mannour, reserving Rent, and afterwards the Lessor grants the Reversion of forty acres thereof; now if an Action of Debt be brought by the Grantee, he may aver the rate of the Acre: and if the Defendant plead *Nil debet per patriam*, the Jury shall rate the value, and although the value be found less by the Jury then the Plaintiff surmisseth, yet the Plaintiff shall recover after the proportion.

For Acts in Law no Attornment is necessary: as if a Lease made for years, reserving a Rent, which is assigned to a Woman for Dower, she shall have the Rent without Attornment. In *Cambels* case upon an *Elegit* returned, that the Lessor was seised in Fee, and that by virtue of the Judgement the moiety was delivered to the Plaintiff; and for the Rent reserved upon the Lease for years before Judgement.

No Attornment necessary for Acts in Law.

If a man top a Tree under the growth of 21. years, and suffer the body to grow; and afterwards when the boughes are grown out again, he doth lop and top it again, I shall pay no Tithes, although the Tree was not priviledged at the first cutting, by the opinion of the whole Court.

Nota.  
For Tithes.

If a Debt be recovered in a Court of Record, that Debt cannot be assigned over to any man by the opinion of the whole Court, *Mich. 10. Jac.*

Nota.

*Pasch. 14.* If Money be to be paid, upon proof made, there the trial shall be the proof to be made before: but if it be to pay Money within 3. Moneths after proof, there proof must be made first: but if it be upon proof before *A.* then proof being made before *A.* this extending proof shall tie the party: but *Warburton* held the contrary, and he resembled this to a surmise to have a prohibition, which is no binding proof, for the Jury may pass against the proof in the surmise: when a Bond is to pay Money upon proof, this is a legal proof by Law, if it be laid generally to be paid by proof; if it were by proof before two Justices, or two Aldermen, this shall be intended a sufficient proof, when the Action shall be brought upon the Bond, and if the Defendant say, that due proof was not made, then they shall say, that before the two Justices, &c. it was proved by testimony before them,

Note how far Proof extends.



them, and then the Judges shall judge whether it be a sufficient proof or not.

Nota,  
Difference.

If I devise Lands to my Executors for three years, for the payment of my Debts, this is Assets in the Executors hands; but if I devise my Land to be sold for the payment of my Debts, it is no Assets before it be sold.

Nota.

*Mich. 9. Jacobi.* It was held in the Common Pleas by the whole Court, that in the Kings case, the consideration of the Money paid, is never to be proved. Likewise in a common case of Bargain and Sale in consideration of Money paid, where in truth none was paid, yet it is good, and the Bargainee is not tied to prove the Payment, for the Bargainer may have an Action of Debr.

Nota.

If a Legacy be granted out of Leases, and a Suit in the Spiritual Court, for this shall not be prohibited, but otherwise it is, if it were out of Fee Simple Lands.

Nota.

**H***Ele versus Fretenden.* Resolution upon two Cases upon the Statute of E. 6. for not setting forth of Tithes, *Videlicet*, A man possessed of Corn sels it, and before two Witnesses sets out his Tithes, and afterwards privately takes away his Tithes: and the Parson sues him upon the Statute of treble Damages, for not setting forth of Tithes: and the Defendant proves by Witnesses, that he set forth his Tithes, yet this Fraud is helped, for the words are without fraud or deceit. In the second case, one secretly sels his Corn to one who was not known, and afterwards the Vendee commands the Vendor to cut the Corn, which he doth, and takes away the whole Corn without setting forth his Tithes; and the Question was, who should be sued for the Tithes: and the Court held the first Vendor should be sued, for it was fraudulent.

Nota.

If a man be found guilty of Felony, and after receives his Pardon, he shall not be *Legalis homo*, to pass upon a Jury.

Copy-hold land  
extendable up-  
on Statute of  
Bankrupt.  
Being a mem-  
ber of the  
Cinque Ports  
will not free  
one from Ar-  
rest.  
Difference of  
things that are  
in Prender and  
that are in  
Render.

If a *Venire facias* be against an Arch-bishop, the *Venire facias* shall be *Tam milites quam alios liberos*, &c. because he is a Lord of the Parliament.

If a man be obliged in a Statute staple, his Copy-hold Land is not extendable, but it is upon a Statute of Bankrupt.

If a man have Common in three Acres, and purchase one of the three Acres, his Common is extinct.

If a man of the Cinque Ports shall come to London, he may be there arrested, and shall not have the Priviledge of the Cinque Ports.

Difference between those things which are in the Prender, and such things that are in the Render; for if I take not such things as are in Prender according to my Prescription, it is void. If I have Esto-

vers

vers in Woods to be taken every other year; if I omit to take them every other year, I cannot take them in the third year. But for Rent, and such other things that are in the Render, I ought to have it when ever I demand it, as it best pleases me. And note, that in such case one prestribed for eight Loads of Wood to be cut and taken, as appertaining to a Messuage, which was held naught by the whole Court, for the Prescription should be laid for Estovers to be employed upon Repairs of the said Messuage, or to be spent in it: for a man cannot prescribe to have a Prescription to come and cut down my Wood, which is as much as I that have the Free-hold can do. For the claim to take and sell my Wood cannot be good. And the Court held it a good Prescription, to prescribe to have Common every other year, although you shew not the Commencement, as to shew what time of the year when it begins. If a man hath Common of Pasture, in divers Closes and parcels of Ground, where he hath some Land of his own, there, and in all other cases where one is to prescribe, he need not to make his Title to every peice, but to say, he hath Common *in loco in quo, &c. int. alia*; and need not to speak of the rest of the Land in the residue of the Feild, because he hath Land of his own. Common appendant belongeth to arrable Land, not to Pasture Land.

Nota.

If two Issues be joyned, and in the awarding the *Venire facias*, these words, *Videlicet, Quoad triandum tam exit istum quam pradium alium exit superius junct.* were omitted, and after a Verdict such Default was moved in Arrest of Judgement; and the Exception over-ruled, and held good, notwithstanding that omission.

Omission in awarding the venire of these words, Quoad triand. &c. held good.

The whole Court were of opinion, that local things shall not be made transitory, by laying the Action in a forrain Shire, as for Corn growing in one Shire, and an Action of Trover brought in another.

Local things shall not be made transitory.

**C**omes *Cumbr. versus Comitum Dorset.* It was moved by the Defendant, that whereas the Plaintiff had prosecuted a *Distring. Jur.* and onely eleven of the Jury appeared, and the Inquest remained to be taken for want of Jurors: and that at such time neither Plaintiff nor Defendant desired a *Tales*; and afterwards the Defendant in another Terme prayed a *Tales* of that Writ which the Plaintiff had prosecuted, and the Court denied to grant it, because he prayed not a *Tales* when the Distress was returned; and if he would have a *Tales*, he must purchase anew, a *Plur. distring.* and if then the Jury fill not, the Defendant may pray a *Tales*, and the Court ought to grant it. And note, upon the first *Habeas Corpus* the Defendant shall not have a *Tales*, but in Default of the Plaintiff.

A *Tales* prayed by the Defendant upon the Plaintiff's *Distring.* in another Terme, but denied.

If Chamberlain  
of Chester  
make an ill  
Return, the  
Sheriff shall be  
amerced.

No Distress in a  
Court Baron  
but by Prescription.

Actions upon  
penal Statutes,  
not within the  
Statute of Jeofailles.

Nota.

Judges not  
meddle with  
matters of  
fact.

Nota.

Information a-  
gainst three,  
and two ap-  
pear, may de-  
clare against  
those two.

**I**f the Chamberlain of the County Palatine of *Chester* make an insufficient Return to the Court of Common Pleas, upon a Writ issued out of that Court; the Sheriff shall be amerced, because the Sheriff is the Officer responsible to the Court.

The King hath power to make and create a Leet anew, where none was before. A Distress is incident of Right, but in a Court Baron a Prescription must be laid to distrain.

**J.** *Rogers* versus *Powell*. My Lord *Cook* held that the Surrender of a Copy-hold in Tail is not any Discontinuance: and Justice *Foster* of the same opinion.

In Doctor *Hussey's* case in a Ravishment *de gard*, wherein the Judgment is penal, the *Habeas Corpus* was denied by the Court to be amended, being a blank Writ after a Verdict, but was adjudged Error. For the Proviso in the Statute of *Jeofailles*, 18 *Eliz.* excepts Actions upon penal Statutes.

One Jury was impannelled of the Town of *Southampton*, and called to the Bar, and made Default; and the men of that Town shewed to the Court a Grant made to the Inhabitants of that Town, that no Return should be made of the men of that Town to be of any Jury, and prayed the Allowance of their Charter, and the Court appointed them to plead their Charter, and it was done accordingly.

**T**rier versus *Littleton*. A special Verdict was found, whether Fraud or not Fraud; and the Jury did not finde the Fraud expressly, but they found Circumstances that the Deed might seem thereby to be fraudulent; but the Court will not adjudge it Fraud, where the Jury do not expressly finde the Fraud; for the Judges have nothing to do with matter of Fact; and so by the whole Court no Fraud.

Tenant for Life, Remainder for Life, Remainder in Tail, Remainder in Fee, the first Tenant for Life suffereth a Recovery, the Remainder in Tail is barred, although the second Estate for Life be no party. *Baron & Feme* seized of the Wives Land for Life of the Wife, Remainder to the Husband and Wife in Tail, and afterwards the Husband doth bargain and sell the Land by Deed inrolled, and a Precipe is brought against the Bargainee, and he voucheth them in Remainder: this is a good Recovery to barr the Estate Tail.

If an Information be brought against three upon the Statute of Maintenance, and two of them appear, and the third doth not appear, the Plaintiff may declare against the two that do appear, before the other appears, for it is but a Trespass and Contempt, as in Trespass and Conspiracy; but it is otherwise in Debt upon a joynt Contract, for there the Plaintiff cannot declare against one untill the Process be determined against the other by the opinion of the whole Court.

If

If Judgement be entred in Trespas of *Old Hillarii*, the Writ to inquire of Damages may bear *teste* of any other Return of that Terme, besides of *Old Hillarii*, for the Terme is as one Day, and so hath been adjudged upon a Writ of Error in the upper Bench; but it is otherwise held in the Common Pleas.

If a Bargain and Sale be void in part, it is void in all.

If an Officer or privileged person of the Court of Common Pleas, sue another privileged man of any other Court whatsoever, yet he of the Common Pleas that first sued, shall force the other privileged person to answer in the Common Pleas; but if a privileged man be sued with another as Executor, no Priviledge lies. Summons and Severance lies between Executors, Plaintiffs; and if one of the Executors be outlawed or excommunicated, he may be demanded, and if he comes not, shall be severed by an award without Process, after he hath appeared, and the other shall proceed without him; but if he had not appeared, then Summons, and Severance shall issue out against him.

**F**letcher versus Robson. An Extent upon a Statute Merchant issued out against Robson the Cognisor, and the Sheriff returned, that the Cognisor was possessed of divers Goods, and seised of Lands, which he delivered to the Cognisee, and that the Cognisee accepted of the Land; and because the Sheriff did not return, that he had not any other Lands, Goods, or Chattels, it was adjudged insufficient, and a new Writ awarded; but many held, that in the case of a Cognisor it was well enough, but not in the case of a Purchasor. If one knowledge a Statute, and after a Judgement is had against the Cognisor, now against the Cognisor the Statute shall be preferred, but not against an Executor. If a man plead a Bond, knowledge to the King in the Exchequer, it must be averred to be a true Debt. If a Debt be assigned to the King, in this case no priority of Execution. If one steal a Debt by 20.s. a year, this shall not stay my Execution: the Court were of opinion, that an Extent would not be good at Barwick, for the Writ runs not there.

If a Judgement be given in a Court of Record, it shall be preferred in case of an Executor before a Statute: But if a man acknowledge a Statute, and afterwards confess a Judgement; and if the Land be extended upon the Judgement, the Cognisee shall have a *Scire facias*, to avoid the Extent upon the Judgement, otherwise in case of Goods, for therein first come first served: for if I have a Judgement against one, and afterwards he acknowledgeth a Statute, and by vertue of the Statute the Goods of him (being dead) were taken in the Executors hands, then upon the Judgement a *Scire facias* was sued, and afterwards a *Fieri facias*, of the Testators Goods: it was held, that the Goods first extended were lawfully extended, and shall be good.

A Judge-

Return of a Sheriff insufficient upon a Statute Merchant, for omitting, that he had no other Lands, &c.

Nota.

A Statute first acknowledged shall be preferred before a Judgement, afterwards retained.



**A** Judgement was had against Sir *Fr. Freeman*, and an Extent came to the Sheriff, and afterwards, and before any thing was thereupon done, one *Fieri facias* against the Executor upon a Judgement, given before the acknowledging the Statute, was delivered to the Sheriff, and the Question was, whether the Extent or *Fieri facias* shall be first executed. And note, if the Land be first extended upon the Statute, and afterwards an *Elegit*, upon a Judgement obtained before the acknowledging the Statute, come also to the Sheriff, the moiety of the Land extended shall be delivered to the Plaintiff upon the Judgement.

The case of  
Villainage  
within the Sta-  
tute of Limita-  
tion.

**H**ill. 15. *fac.* The case of Villainage is within the Statute of Limitation, and in the case of *M. Corbet* it was held, that the Prescription of the Seisin of the Plaintiff and his Ancestors, as Villain, was more then needeth, and the Issue thereupon taken was good by the whole Court, after Exception taken thereupon: and Judgement was given for the Plaintiff.

Nota in Ele-  
git.

In every *Elegit* the Sheriff must return, and set out the moiety distinctly, unless they be Tenants in common, and in that case he must return the special matter. An Extent issued out against one *Greisley* by the name of *Greisley* Esquire, who was at the time of suing out the Writ made Knight and Baronet, and it was naught, and the Plaintiff prosecuted a new Writ.

Two Inquisi-  
tions taken at  
several Dayes  
by several Ju-  
ries upon one  
writ, naught.

**M**ich. 10. *facobi.* A Tenant by Statute Staple or *Elegit*, that hath extended an Abbots Lease, or a Lease made out of an Abbots Lease, is not bound to shew it, because he cometh in by Act of Law: but any other that cometh in under the Lease, must shew it, by the opinion of the whole Court. And note, that in *Hillary* 10. *fac.* two Inquisitions taken at several Dayes by several Juries upon one Statute Merchant, were adjudged naught; one was taken of the Land, and the other for Land and Goods: and Extent of the whole fourth part was naught, for it should be of the moiety of the fourth part: and mark, it was of a Lease, which was but a Chattell, and the Sheriff might have sold it as Goods, but seeing he had extended it, in this case he should receive benefit but as in a common Extent.

Nota.

All Goods and  
Chattels bound  
by the Teste of  
the *Elegit*,  
and cannot be  
sold after-  
wards.

**C**omyrrs versus *Brandling.* A Lessee that had a Lease of the value of 100*l.* and after the Teste of the *Elegit*, and before the Sheriff had executed the *Elegit*, assigns his terme to one, who assigns it over to the Plaintiff in the *Scire facias*, and afterwards, and before the last Assignment the Sheriff executes the *Elegit*, and delivers the Lease to the Plaintiff, *tenend, &c.* for satisfaction of the Debr, which came to but 43*l.* 6*s.* 8*d.* & it was held by all the Judges, that the Sheriff could not



not deliver the Lease at another value then what the Jury had found it at ; and the Sale made by the Sheriff is as strong as if it had been made in open Market : and that all the Goods and Chattels are bound after the Teste of the *Elegit*, and cannot be sold by the Owner after the Teste of the Writ.

If a later Extent be avoided by an ancient Extent, after the ancient Extent is satisfied, the later Extent shall have the Land, according to his first Extent, without any re-extent, by the opinion of Serjeant *Huston*, if the Husband charge the Lease of the Wife, and dieth, the Wife shall hold the Land discharged.

**H**ill. 12. *fac.* The Earl of *Lincoln* against *Wood*, the Earl of *Lincoln* did arrest *Wood*, upon a *Capias*, upon a Statute Merchant, *Wood* being in Execution, obtained in the Chancery an *Audita Quarela*, and did put in Bail there, and had a *Superfedeas*, and was discharged of his Imprisonment ; and the *Audita Quarela*, and Bail sent into the Common Pleas to be proceeded on. The cause of the *Audita Quarela* was grounded upon the performance of the Defeasons of a Statute ; and after this case was debated for the Bailment of *Wood*, and held by the Court to be good, it was allowed of.

*Audita Quarela* and Bail put in in the Chancery, and held good.

If the Act for Dissolution of Monasteries had not given the Land to the King, the Founders ought to have had them. And if an Hospital or religious House is impeached upon the Statute of Superstitious uses, it must be proved to be regular, for they must be religious that are dissolved, by *E.6.*

The Act of *E.6.* for Dissolution, reaches onely to such that are regular.

**J**oules versus *Joules* Alderman purchased Land of one, against whom a Judgement was given long before the Purchase, and the Vendor afterwards became unable to pay the Judgement, and long after the Plaintiff in the Judgement purchased a *Scire facias* against the Defendant, and had Judgement against the Defendant by Default, and afterwards had an *Elegit*, and by vertue of that the Sheriff extends the Land of *Joules* the Purchaser, who prays the aid of the Court, because the whole Land was not extended, but he was forced to bring his *Audita Quarela*.

If I make a Lease for years, reserving a Rent during my Life, and my Wives Life, if I die, the Rent is gone, because she is a stranger, she shall never have the Rent, because she hath no Interest in the Land ; if one of them die, nothing can survive to the other, and a Limitation must be taken strictly, otherwise it is by way of Grant, that shall be taken strongly against the Grantor.

*Nota.*

If 2. Tenants in common joyn in a Lease for years, to bring an Ejectment, and count *Quod cum dimississent, &c.* that is naught, for it is a several Lease of their Moities, and you must declare, *Quod cum*, one of

*Nota.*

of them demised one moiety, and the other the other moiety, and good.

Nota.

If a Tenant in Socage hath Issue, and die, his Issue being under the age of 14. years, the next Freind of the Heir, to whom the Inheritance cannot descend, shall have the Guard of the Land, untill the Heir come to the age of 14. years, and he is called Guardian in Socage, and in pleading a Lease for Life, you are never to alleadge the place where the Lease was made, because it passeth by Livery, which was executed upon the Land. He that pleads a Demise, ought to shew that the Lessee entred, and he that pleads a Descent, ought to shew that he entred: and an Exchange is a good Plea in Bar, but it shall never be adjudged a good Exchange, except this word *Escambium* be used in the Charter of Exchange.

Nota.

**H**opkins versus Radford. A Defendant shall take no benefit of his own wrong. In Sir James Harringtons case, the Original was returned *Quinque Pasch.* and the issue joyned that day, and the *Venire facias* returned that day, and held naught by the Court upon the first motion. A future Lease cannot be surrendered but drowned.

Deed of Gift  
for things in  
Action.

For things in Action a Deed of Gift is void, as Debts without Specialty, although he say, Goods, Chattels, and Specialties, but for other Debts by Specialty, and Goods, it is good; and for the Debts in Action after the Death of the Party Administration is to be granted, and the Administrator is to have the Goods.

Superfedeas  
granted, be-  
cause Capias  
ad satisfaciendum  
was not  
returned.

**R**ainer versus Mortimer. One had Judgement upon a *Scire facias* to have Execution, and a *Capias ad satisfaciendum* returnable, 15. Martini, and that Writ was returned *Album Breve*, and a *Testatum* thereupon, and the Defendant taken, and this matter was moved to the Court, and a *Superfedeas* prayed, that the *Testatum* issued out erroneously, because the *Capias* was not returned; and it was granted by the whole Court, because the *Capias* was not returned.

Nota.

One seised in Fee may bargain and sell, grant and demise Land to others, and their Heirs, to the use of one for years, because he hath a Fee-simple, but Lessee for years cannot bargain and sell his Lease, to the use of one for years.

Nota.

If a Marriage is intended between two men, and one of them in consideration that the other hath upon the Marriage, assured Land to his Son, he doth assume to pay to my Son such a Summ, immediately after the Marriage; if the Money be not paid, the Son must have the Action, and not the Father.

Mich.

**M***Ich. 5. Jacobi. 61.* One Jury-man appear in Court, and when he came to the Barr to be sworn, he informed the Court that he was eighty years old, and prayed to be discharged, and the Court could not grant it, nor pass him by, and swear others, without committing Error, except the Parties would consent; for it is Error to skip a Juror who is returned, if he appear, and therefore the Juror was drawn by the consent of the Parties.

*A Juror who hath appeared, cannot be passed by, and to swear others.*

**T***Rin. 6. Jacobi.* Upon a *Levari facias* out of a Court Baron, Goods cannot be sold without a Custome to sell the Goods: and if Goods be attached by *Pone* out of a Court Baron, the Defendant shall not lose his Cattle; otherwise it is, if it be a Process out of the Common Pleas, then the Defendant loseth his Cattle, for not appearing: if you lay, that you have a Court time out of minde to be held before a Steward, you must shew what Pleas you have used to have Conusance of.

*Goods cannot be sold upon a Levari facias, in a Court Baron without a Custome.*

A Sheriff returned but 21. onely upon a *Venire facias*, and at the Triall ten onely appeared, and a *Decem tales* was awarded, and tried, and Verdict for the Plaintiff; and this matter was moved in Arrest of Judgement, for that the Sheriff had returned but 21. and the Court were of opinion, that if 12. of them had appeared, that it had been good notwithstanding; but because 10. onely appeared of the principal, therefore it was naught; and Judgement arrested for that cause. If a Juror be sworn of the principal, and the Jury remain, when the Jury comes again, he shall be sworn again.

*Sheriff returned but 21. upon a Venire facias, and naught.*

*Nota.*

**T***Rin. 6. Jac. rotulo 251. Dunnall versus Giles.* A special Verdict, and the Question was, a man being possessed of a terme, devises the whole terme to *A.* for Life, and if he dies within the terme, to *B.* during the minority of *C.* and that *C.* when he comes to full age shall have the Remainder of the terme, and held a good Devise. To devise Land, or Terme, or Lease, all one, it is an Executory Devise. If one surrender Land to the use of an Estranger, that is, to restry the use in Reversion, for the Land is in him immediately. If a man hath a Rent in esse, you cannot grant that in Reversion after your Death; but if I surrender to the use of one after my Decease, is not good, by his opinion of *Warburton* and *Daniel*.

*Judgement, that it was a good Devise.*

If the Sheriff shall by vertue of a *Fieri facias* levy the Debt and Damages of a man, and make a Return, that the said Goods remain in his hands for want of Buyers: the Property remains still in the Defendant, although the Sheriff hath Possession of the Goods. A Sheriff may sell Goods levied upon a *Fieri facias* out of his County.

*The property is not altered, upon the Sheriffs taking of goods upon a Fieri facias, but remains in the Defendant.*  
*Nota.*

In *Watermans* case, the Issue was, whether a Copy-holder in one  
G Town

Town ha: Common in Land lying in another Town, and the Plaintiff shews that he is Lord of the Hundred of C. within which Hundred one of the Villages lie: and prays a *Venire facias* of the Town next adjoining to the said Hundred; and it was granted, and tried, and Exception to the Triall, for that the *Venire* was not of both Villages.

Alien born no  
Plea in a Writ  
of Error.  
Nota.

An Alien born being no free Denizen may defend and bring a Writ of Error, and it is no Plea to say, that he is an Alien born.

Issue cannot be  
bastarded after  
Death.

Note, by the Common Law the Lord of the Mannour may come and take away a Tree cut down upon the Copy-hold Land by his Copy-holder, without laying a special Custome for it.

If there be an unlawfull Marriage, as the Brother doth marry his Sister, and they have Issue, and one of them dieth before any Divorce had between them; now after the Death of one of them, the Issue cannot be bastarded, as in *Cordis* case, 39 E.43. 22 E.4.

After a general Imparlance one cannot plead an Outlary in Barr to an Action of Trespass or Case, but it must be pleaded in abatement, except he be outlawed after the last Continuance; for you shall plead nothing in Barr but what goeth to the pit of the Action; now the Damages in Trespass or Case are not forfeited by Outlary, as Debt, because of the uncertainty.

Nota.

To the Owner of the Soil on both sides of the way, of common right belong the Trees that grow in the Lane, whether he be Lord or Free-holder. The best badge of truth, is the usage of taking the profit of the Trees.

where the prin-  
cipal is omitted  
cannot be sup-  
plied by writ.

11 H.4. rot.80. Where the Court, *ex officio*, should inquire, and that omitted, the Court may supply it; but where an Attaint lyeth, that is not to be supplied, as in a *Valore Maritagii*, the value is the point of the Writ, and if that be omitted by the Jury, never to be supplied by Writ. *Cheyneys* case, *Valore Maritagii*, and intrusion were at the Common Law before the Statute, and the Statute doth but enlarge the Common Law; for by the Statute the Judgement is otherwise then at the Common Law.

Nota.

It is vain to plead the Execution of a Writ of Seisin upon a Recovery, but to plead that he did enter.

King could not  
grant preceden-  
cy in publique  
things.

**M**Ich. 10. Jac. If I purchase Land by a name, and alleadge it to be in a wrong Parish, or Shire, it is good, notwithstanding the mistake by the Court.

A stranger shall be bound by a Law made for the publique good, but he must come within the place where it was made.

Nota.

The King cannot grant precedency in publique things, as to go by Water, or by passage on the Land, as by Coach: if a Bond bear Date *Super altum mare*, then it must be sued onely in the Admiral Court; otherwise it cannot be sued there.

Every



Every Bishop hath his Cathedral and Councel, and the Councel and Bishop there decide matters of Controversie, the Prebends have their names from their affording of help to the Bishop, and in time of the vacancy of the Bishop, the Arch-bishop is Guardian of the Spiritualities, and not the Dean and Chapter.

**T***Rin. 14. Jac. rotulo 1810. Birtbrook versus Battersby* Exception taken after Triall. The Action was laid in *Westmerland*, and the *Jurata* written at the end of the Record, was *Ebor. ss. ura. Inter. &c.* and recites the Day of Triall in the County of *York*, and the place where the Triall was, at *York*, and prayed that it might be amended, and it was granted to be amended, by the whole Court.

**I***Nt. Bullen & Jarvis.* The *Venire facias* was made in this Form, *Videlicet, Liberos & legales homines de B.* and it should have been *De vicineto de B.* and it was notwithstanding held good, and amendable by the Roll; for it shall be intended, that the Jurors are inhabiting in the Town of *B.* although the Sheriff returns the Jurors of other places, and none of them be named of *B.* and the *Venire facias* was returned by *A. B. Ar.* without naming him *Vic.* and it was amended by the Court.

**G***Riffin versus Palmer, Trin. 15. Jac. rotulo 924.* Issue taken, whether the Lands contained in the Fine were ancient Demesne or not, pretending they were parcell of the Mannour of *Bowden* in the County of *Northampton*, which was pretended to be ancient Demesne, and the Doomesday Book was brought into the Court, and by that Book it appeared, that the Mannour of *Bowden* was in the County of *Leicester*, and not in the County of *Northampton*, but the Councel affirmed, that the Mannour was both in the County of *Leicester* and *Northampton*, but it valued nor, for the Doomesday Book was against the Plaintiff.

*Ancient Demesne tried by Doomesday Book.*

The Court was moved to amend a *Venire facias*, which was *Album Breve*, but the Court would not grant it, although the Sheriffs name was put to the Pannell; but if the Sheriff upon the *Venire facias* had returned, that the Execution of that Writ did appear in a certain Pannell annexed to that Writ, and had not put his name to the Writ of *Venire facias*, but to the Pannell, in such case the Court would have amended the *Venire facias*.

*The Venire facias was Album Breve, and denied to be amended.*

Lessee at will cannot grant one his Estate, if one occupy with Tenant at will, this is no Disseisin, to the Lessor. If a Tenant for seven years suffer Trees to grow above the age of 21. years, they are Timber, and it is waste to cut them. Tenant at will shall pay his Rent, when he holdeth over his terme, but Tenant at sufferance shall not pay any Rent. If a man holdeth over his terme, and pay his old Rent, he shall be accounted Tenant at will.

*Lessee at will cannot grant over his Estate. Note, difference between Tenant at will and sufferance.*

Nota.

If one being sick, giveth Notes to make his Will, and after by infirmity of sickness he becometh so weak that his memory faileth him, and these Notes are made into a Will, this is a good Will, otherwise it is, if he become lunatique after the Notes given.

One committed, bailed, being no cause expressed.

**M**Ich. 15. *Jacobi*. One *Warter* was committed to the *Fleet* by the Lord Treasurer of *England*, and the Prisoner was brought to the Common Pleas by *Habeas Corpus*, which was returned, and no cause of the Commitment expressed, and for that cause the Prisoner was set at liberty, and bailed.

Attorneys name put out of the Roll for a mis-demeanour.

Nota.

**T**Trinity Terme 15. *Jacobi*. *Hanson* one of the Attorneys of the Common Pleas delivers a Note to the Sheriff's Clerk, of the names of divers Jurors that were to be returned, and of divers others that were not to be returned, in a case concerning one *Butler*, and for this Offence he was put out of the Roll of Attorneys.

Nota.

In *Spilmans* case; if I have Estovers in Land, and cut down Estovers, and a stranger taketh away the Estovers, I shall have an Action against him that taketh them away, although he have there Common of Estovers also.

Nota.

If the Husband sow the Ground, and die, the Executors and not the Heir shall have the Corn; but if the Father sow the Land, and dieth, or the Heir sow the Land, and the Wife recover Seisin in Dower, she shall have the Corn.

The setting open a Shop on the Sabbath day is punishable by Statute Law, and so is a House of Bawdry, and not to be dealt with by the high Commissioners.

So long as the Land is occupied by him that hath the Fee-simple, which did formerly belong to the Order of the *Cistercians*, it shall pay no Tithes, but if he let it for years or life, the Tenant shall pay Tithes.

Writ of Entry filed after the Death of the Tenant.

**H**ill. 11. *Jac. rotulo 90*. A Recovery was had upon a Writ of Entry in *le post*, for a common Recovery between *Hartley* and *Towers*, in the County of *Bucks*; the Attorney who prosecuted the Recovery, by negligence did not file the Writ of Entry, which was prosecuted orderly, and all Fees paid, when the Recovery was passed. And in *Easter Terme*, 14. *Jac.* it was moved that the Writ of Entry might be filed, and it was granted, although the Tenant was dead, the Writ of Entry was returnable, *Ostabis Purificationis*.

**M**Ich. 14. *Jacobi*. My Lord *Hubbard*, Justice *Warburton*, and *Winch*, held, that when there were but three Judges of the Common Pleas they might argue Demurrs, and if two of them were of one minde, and one of the other, the Judgement should be given according to their opinions.

My

My Lord Cook said, that for the Body of the Church, the Ordinary is to place and displace; in the Chancell the Freehold is in the Parson, and it is parcell of his Gleab; Trespas will lie by the Heir for pulling down the Coat-Armor, &c. of his Ancestors, set up in the Church. A Pew cannot belong to a House.

Ordinary to place and displace in the Church.

Fraud shall never be intended, except it be apparent and found, and that conveyance which at the time of the making was good, shall never by matter *ex post facto* be adjudged to be fraudulently made, for before *primo Eliz.* at the Common Law. A conveyance made for natural affection without valuable consideration is not to be avoided; none shall avoid it, but such as come in upon valuable considerations.

Fraud shall never be intended, except apparent and found.

Lands devised to one in Tail upon condition, that he shall not alien, and for Default of such, the Remainder to R, in Tail, this is a Condition, and no Limitation, by the whole Court; and the Heir at the Common Law may enter for the Alienation.

Nota.

Matters of instance which are between party and party, as for Tithes, and Matrimony, are not to be dealt withall by the high Commissioners, if they proceed *inverso ordine*, that cannot be holpen in the Common Pleas but by superior Magistrate, if they be Judges of the cause.

High Commission nothing to do with matters of instance for Tithes.

If one in *Norfolk* come within another Dioces, and commit Adultery in another Dioces, during the time of his residence he may be cited in the Dioces where he committed the Offence, although he dwell out of the Dioces, by Cook, Warburton, and Winch.

Nota.

If the King grant Lands to A. and his Heirs Males, and doth not say, of his Body, he is but Tenant at will, *Tamen quare*.

Nota:

A Deputy of an Office for Bribery cannot make his Master be punished corporally, but pecuniarily, equity shall not barr me of the benefit of Law. Note, the Probate of Wills and Administrations did not belong to the Ordinary originally, but to the Common Law.

Master shall not be corporally punished for his Deputies Offence.

If two Aliens be at Issue, the Inquest shall be all *English*; but if between an Alien and Denizen, that Inquest shall be *de medietate Lingua*, 21 H. 6. 4. A Judgement given against a dead person is not void, but Error, 28. Aff. 17.

Nota.

A Juror was committed to the Fleet, for making his Companions stay a whole Day and a Night, having no reason for it, and without the Assent of any of the rest of his Fellows, and after was bailed, but not untill the Court was advised, 8 E. 3. 75. In a Writ of Estate *Probanda*, every Juror ought to be of the Age of 42. years.

Nota.

If I grant Land to one, and his Heirs, in the Premises of the Deed, *Habendum*, to him, and the Heirs of his Body, he shall have the Land in Tail, and the Fee-simple after the State in Tail, when the Estate is certain in the Premises, the *Habendum* shall not contrroll it.

Nota.

If

One at seven-  
teen years old  
may be an Exe-  
cutor.

If one make two Executors, one of seventeen years of Age, and the other under Administration, during the minority is void, because he of seventeen years old may execute the Will of Administration, during the minority, in such case be granted; and the Administrator brings his Action, the Executor may well release the Debr. *Pigor and Gascoins* case.

No new notice  
needs if the  
Attorney be  
living.

If a Record go once to Triall, and warning given, if the first Attorney be alive, the Plaintiff is not tied to give warning again, but if the Attorney be dead, he is.

If no place of  
Payment be in  
a Will, must be  
a Request.

If no place of Payment be in a Will, which appointeth Money to be paid, there must be a Request to pay the Money, for he is not bound to seek all England over for him; otherwise it is, if it were by Bond.

In every case where the Plaintiff might have Judgement against the Defendant, there if the Plaintiff be non-suit, the Defendant shall have his Costs, if the Plaintiff be non-suit.

Nota.

**T***rin. 11. fac.* In cases of remitting causes from the inferior Judge, the Arch-deacon cannot remit the cause to the Arch-bishop, but he must remit it to his Bishop, and he to the Arch-bishop.

It was held by the Court, that one might distrain for a Legacy. In a special Verdict the Plaintiff must begin to argue first.

Warrant of At-  
torney filed up-  
on a motion,  
after writ of  
Error brought,  
and Error as-  
signed.

**O***live versus Hammer.* A Writ of Error was brought upon a Judgement by *Nil dicit*, for want of a Warrant of Attorney, and the Record certified, and a *Certiorare* to the Clerk of the Warrants, and Error assigned for want of a Warrant. And the Court was moved, that a Warrant might be filed, and it was granted, and a Warrant filed accordingly.

Nota.

*Pasch. 12. fac.* An Action was brought against *Baron & feme*: and an Attorney appeared for the Husband alone, and the Court held, it was the Appearance of *Baron & feme* in Law.

Warrant of At-  
torney filed af-  
ter writ of Er-  
ror, by Order of  
Court.

**P***asch. 12. Jacobi. Sheriff versus Whitsander.* One Judgement was confessed in *Trin. 42. Eliz. rotulo 504.* And afterwards in *Trinity Terme 43. Eliz.* the Defendant brought a Writ of Error bearing Date the 12. of *May, Anno 43.* and upon that Writ the Record was certified 25. *May*, and afterwards Error was assigned in the upper Bench, for want of a Warrant of Attorney by the Defendant. And *Mich. 43. & 44. Eliz.* the Warrant of Attorney was received, and entered upon Record by Order of Court of Common Pleas. And the like was *Pasch. 2. fac. rotulo 1956. Int. Bathgrone and Smith*, and the like, *Mich. 1. fac. rotulo 1306. Inter Smith & Kent.*



**C***rane* versus *Cospit*. Question was, whether the Attornement of an Infant be good or not : and by the whole Court it was held good by three Reasons ; First, he gives no Interest. Secondly, it is to perfect a thing. Thirdly, he is a Free-holder.

*Attornement of an Infant is good.*

**I**t was held in the case of *Gage* an Attorney, who as an Administrator brought an Action of Priviledge, that his Priviledge ought not to be allowed. And after a Bill was filed against *Drury* an Attorney, as Executor, and held, that the Bill would not lie, but in both cases the Suit should be by Original.

*An Attorney ought to have no Priviledge as an Attorney.*

**B***earbrook* versus *Read*. The name of Confirmation must stand, for Sir *Francis Gandy* was christened *Thomas*, and confirmed *Francis*, by that name he must be called.

**S**ir *Henry Compton* was sued for Cloathes of his Wife, bought without his command or privity : and the whole Court were of opinion, that if the Wife should buy Merchandises, and thereof make Cloathes, and wear those Cloathes, although the Husband know nothing of them, yet he shall pay for them.

*Husband shall pay for his Wives Clothes, though bought without his privity.*

**P***afch*. 10. *fac*. The Court was moved, to know whether the Wife of a Bankrupt can be examined by the Commissioners upon the Statute of Bankrupt ; and they were of opinion, she could not be examined. For the Wife is not bound in case of high Treason to discover her Husbonds Treason, although the Son be bound to reveal it : therefore by the Common Law she shall not be examined. An Infant shall not be examined.

*A mans wife or Infant cannot be examined.*

If an Administration be granted to one, during the minority of two Infants, and one of them dieth, the Administration continueth still.



*Actions of Debt.*

**L***ovelace* versus *Cocket*, *Mich*. 6. *fac*. rotulo 1001. Action of Debt brought upon an Obligation for the Paiment of Money at a certain Day specified in the Condition. The Defendant pleads, that the Plaintiff at the Day of Payment accepts of another Bond for the Payment of the said Money, in satisfaction of the said 52. l. 1 s. s. and upon a Demurrer held to be a naughty Plea, for one Bond cannot overthrow another.

*One Bond cannot overthrow the other.*

*Lea*

Exceptions to  
an Award,  
pretending the  
Arbitrators  
had exceeded  
their Authority,  
but ad-  
judged good.

**L**ea versus Pain, Hill. 14. Jacobi rotulo 953. An Action of Debt brought upon an Obligation with a Condition to perform an Award, the Defendant pleads, that the Arbitrators made no Award. The Plaintiff by way of Replication sets forth an Award, that the Arbitrators did arbitrate of all matters, untill the Date of the Award, which was a Moneth longer then the Submission, and so pretends they exceeded their Authority. The words were for all causes before the Date of the Award. Another Exception was, because the Arbitrators awarded that the Defendant should pay the Plaintiff such a Day of April, and doth not say, what year, or next following: and the Court held that good enough, because the second Day of Payment was made to be such a Day, and such a year: and it was held good enough, for if any new matters did arise between the Submission and Award, or, &c. the Defendant ought to shew it. Another Exception was, that it was not said, that the Award was made between the Parties, but it shall be intended to be made between the Parties, because the Award was made *de & super premissis*, and therefore it shall be implied, that it was made but of such things as they had power to deal in. The Court was of opinion, that the Award being *de & super premissis*, the Court shall not say, but that this was a cause submitted; and except it had been discovered by pleading, that there was a new cause since the Date of the Award, which was made known to the Wardsmen, the Court is not to take notice thereof.

Judgement for  
the Defendant,  
for insufficiency  
in the Count.

**S**cot Executor versus Herbert. The Plaintiff in his Declaration slayes the Testator in his life-time was possessed of Land for a terme of years; and so possessed grants part of his terme to an Estranger, reserving Rent, and he grants his Estate to the Defendant. And that the Testator died possessed of the Reversion of the terme, and because the Rent was behinde, the Executor brings his Action of Debt for the Rent, and the Declaration was held naught, for that it did not appear that he that made the first Demise was seised in Fee, or in any other Estate by which he could make a Lease.

Judgement for  
the Defendant,  
upon a by-law.

**N**orris and Trussell Wardens of the Society of Weavers in the Town of Newbury in the County of Berks, versus J. Scapes, Pasch. 14. Jac. rotulo 907. An Action of Debt brought, and the Plaintiffs declare that Queen Elizabeth had incorporated them by such a name, and given them Power to make by-laws, for the better governing their Corporation, &c. and further shew that they made an Order which was confirmed by the Justices of Assise according to the Statute of 19 H.7. and for the Breach of such Order brought their Action: the Defendant pleaded that he owed them nothing, and

and tried, and a Verdict for the Plaintiffs, and *Hutton* Serjeant moved in Arrest of Judgement, and took three Exceptions: the first, because the Constitution was against Law, to restrain one to exercise a lawfull Trade. The second, the Constitution was, that the Offender should forfeit such a sum, and it did not appear to whom this Forfeiture should go. Thirdly, the Plaintiff shews in his Count, that the Queen by her Letters Patents had appointed *A. B. C.* to be Wardens for one year, and shews not which those that brought the Action were elected, which ought to be, to intitle them to that Action. It was against sense to barr all their own Apprentices, it doth not appear how many Wardens should be, and they do not intitle them to the Action by the Corporation, the Law is altered; and Judgement was given for the Defendant.

**B***Ret versus Averder, Mich. 29. & 30. Eliz.* Debt brought upon an Obligation, to perform an Arbitrement: the Defendant confesses the Arbitrement, but pleads in Barr, that the Plaintiff did not require him to make Payment, and to that Plea the Plaintiff demurrs; and it was adjudged no Plea; for the Defendant at his perill ought to make Payment, and the Plaintiff ought not to make a Request.

*The Defendant at his perill ought to make Payment.*

**H***ales versus Bell, Trin. 39. Eliz. rotulo 1974.* The Plaintiff brought an Action of Debt upon an Obligation, with a Condition for the Payment of 40*l.* within fourteen Dayes next after the return of one *Russell* into *England*, from the City of *Venice*, and then the Obligation should be void; the Defendant pleads in Barr, that the said *Russell* was not at *Venice*, upon which Plea the Plaintiff demurrs: and adjudged a naughty Plea; for where part is to be done within the Realm, and part out of the Realm, the Plea ought to be triable within the Realm.

*If part of a Condition be to be performed within the Realm, and part without, ought to be triable here.*

**C***arret versus Harrison Executor, Trin. 40. Eliz. rotulo 1651.* To an Action of Debt upon a Bond brought against him as Executor; the Defendant pleads six Judgements in Barr; the Plaintiff replies, that they were by fraud and covin; and the Jury found for the Plaintiff, that two of the six were by covin; and *Williams* moved in Arrest of Judgement, because the Jury ought to have found all; but *Glanville* said, that if any part of the Plea be insufficient, defective, or false, the Issue shall be found against you, for your Plea is one intire thing; and he said, that the Plaintiff should have taken Issue upon one onely, as in an Obligation, with diverse things in the Condition. *Walmsley* held, that by the Plea the Defendant had confessed implicatively, that you have sufficient to satisfie those six Judgements, and no more. So that if any part be found against you, this is Assets; and Judgement was given accordingly for the Plaintiff.

*Defendant pleaded six Judgements in Barr, and two found to be by fraud, and Judgement for the Plaintiff.*

H

*Green*

**Green versus Wilcox** Executor. To an Action upon an Obligation brought against the Defendant as Executor, he pleads that the Testator was obliged to *A.* in 20*l.* which remained due to him at his Death; and that the said *A.* recorded against him in the Common Pleas, and avers that it was a true Debt, and the persons and matters to be the same, and that he had no Assets beyond that; and the Plaintiff replies, that the said Recovery was had by fraud and covin between them, to defraud him of his Debt; to which Plea the Defendant demurs, specially because he had in his Plea averred, it was a true and just Debt, so that it could not be by covin.

The Sheriff cannot break open the outward Door to do Execution, but that being open he may break open any other.

**TRIN. 44. Eliz.** It was adjudged for Law by the whole Court, that if a *Fieri facias* be directed and delivered to the Sheriff, he may not break the outer Door of the House, and enter, and do Execution; but if the outer Door be open, then he may enter by that, and then he may and ought to break the Door of an Entry or Chamber which is locked, and break open any Chest which is locked, and take the Goods in that in Execution; and if he doth it not, an Action of Case will lie against him.

In Debt, if it be demanded by Original, the Process is Summons, Attachment, and Distress; and for Default of sufficiency upon a *Nichil*, returned Process to the Outlaw, if the Summons or Attachment be returned, an Essoyn lies. And Wager of Law lies if the Count be upon a simple Contract. And if the Parties be living which made the Contract or Debt against an Heir, the Writ shall be brought in the *Debet*; but when it is brought against an Executor, or Administrator, or of Chancellors, it shall be in the *Detinet tantum*. The Judgement in Debt where the Demand is in the *Debet & detinet*, is to recover the Debt, Damages, and Costs of Suit; and the Defendant in *miser cordia*; but if the Defendant denies his Deed, then a *Capias* for his Fine issues out. And if the Original be in the *Detinet* for Chattels, then the Judgement is to recover the thing in Demand, or the value thereof, and Costs, and Damages; and the Process of Execution is a Distress to deliver the Chattels, or the value, and Damages. And if the cause of Action be against Executors or Administrators, the Judgement is to recover the Debt and Damages of the Testators Goods, if the Executor hath so much in his hands, and if he hath not, then the Damages of the Executors or Administrators proper Goods. And if the Sheriff upon a *Scire facias* return a *Deonestavit*, then a *Fieri facias*, or *Elegit*, may be sued out to levy the Debt and Damages of the Executors or Administrators proper Goods. And if the Executor plead, that he never was Executor, and it is found against him that he hath administered but one Penny, the Judgement shall be to recover the Debt and Damages of the Executors own Goods. Debt brought upon a Record, the

Exe-



Execution shall be brought where the Record remaines.

**M***Ich. 9. fac. rotulo 2304. Throckmorton Administrator, versus Hobby.* The Administrator releases, and afterwards the Administration is revoked, and declared by Sentence to be void and null, and then the Release is void.

**T***Rin. 9. fac. rotulo 917. Brookesby & Vaux versus M. Tretham.* Executor of the Testament of T. T. and Exception was taken to the Defendants pleading, because the Defendant pleads divers Statutes to divers persons; and the Plaintiff shews that some were by fraud, and that others were for performance of Covenants, that were not broken, and for other Statutes that they were satisfied, and the Defendant in pleading a Statute by three, sayes, two of them did not pay, and doth not say, that the three nor any of them have not paid. In pleading of a Statute it must be generally pleaded, that it is a true Debt. And my Lord *Cook* held, that a man without a Defenceance may plead, that the Statute was acknowledged for Payment of a lesser sum; and it was held, that if the Count be good, and the Plea naught, and Replication naught, if it appears that the Plaintiff had good cause of Action, the Plaintiff shall have Judgement. And *Warburton* said, that one may plead generally, that the Statute was acknowledged by fraud, without shewing the special matter.

Exception taken to the Defendants Plea.

Nota.

**S***Peak versus Richards.* The Plaintiff brought an Action of Debt for Money levied by the Sheriff upon a *Levari facias*, and not paid to the Plaintiff upon the Sheriffs Return upon the *Levari* issued out of the Chancery, and that it would well lie. But note, the Plaintiff had concluded his Demurrer ill, for he demurring to the Defendants Plea, which was grounded upon a Release should have demanded Judgement, if the Defendant should be admitted to plead a Release, which was made after the Sheriff had made his Return.

Debt lies for Money levied by the Sheriff, upon a *Levari*.

**T***Rin. 15. fac. rotulo 1630. Parson versus Middleton.* Action of Debt brought to be tried in *Durham*, and the Record sent to the Chancellor of *Durham*, because the Bishops Sea was empty, and before the Day given by the Judges, a Bishop was elected, and he sent the Record, and not the Chancellor.

Nota.

**M***Ich. 15. fac. rotulo 2118. Maddock versus Young.* The Plaintiff brought an Action of Debt for an Escape against the Sheriff upon a *Capias utlegat*, after Judgement; the Defendant pleads that there was no such Record of the Recovery of the Debt and Damages; to which Plea the Plaintiff demurs, pretending he had not

Nota.

directly and plainly answered the Declaration, but Judgement was given for the Defendant. Where a *Capias* is not the Process, a *Capias ad satisfaciendum* is not the Execution; and no *Capias* lies against a Countess or Baroness; and at Common Law no *Capias ad satisfaciendum* would lie, but only where the Action was *Vi & armis*, but only a *Levari facias*.

Exception taken, because the *Venire facias* was of the Town, and not of the Parish, but ruled good.

**M**Ich. 14. Jac. rotulo 3140. *Bawkey* versus *Isted*. An Action of Debt brought upon the Statute of E. 6. for not setting forth of Tithes of Land lying within the Parish of *Horsted parva*, the Defendant pleads *Nil debet per patriam*, and after Triall and a Verdict, Exception was taken to the *Venire facias*, because the *Venire facias* was of *Horsted parva*, and not of the Parish of *Horsted parva*, but the Court were of opinion, that it might be either of the Town or Parish of *Horsted parva*, and Judgement was given for the Plaintiff, because both the Town and Parish were named in the Record.

Creditor administered, and is sued, ought to plead fully administered generally.

An Action of Debt brought against an Administrator, who pleads, that the Intestate was indebted to him, and that he had fully administered, and that he had no Goods or Chattels which were the Intestates, beyond Goods and Chattels to the value of 10*l.* which the Administrator retains towards satisfaction of the said Debt to him due, the Court were of opinion that the Administrator ought to plead generally, fully administered, else the Debtor should be prejudiced in taking Issue upon that Plea, the Case was between *Fox* and *Andrew*.

Debt brought for 60*l.* it be paid at the Return of a Ship from New-found-land to Dartmouth, only 50*l.* lent is not usury.

**P**Asc. 6. Jac. rotulo 751. *Sharpley* versus *Hurrell*. Action of Debt brought upon an Obligation, and the Defendant pleads the Statute of Usury, and sets forth, that one Ship went a fishing to *New-found-land*, which Voyage might be performed within eight Moneths, the Plaintiff delivered fifty pounds to the Defendant, to pay sixty pounds upon the Return of the Ship to *Dartmouth* from fishing, and if the Ship should not come to *New-found-land*, by reason of Leakage or Tempest should return to *Dartmouth*, then the Defendant should pay the principal Debt, and if the Ship should never return he should pay nothing; and it was held by the Court that it was not Usury, for if the Ship stayed at the *New-found-land* two years he should pay but 60*l.*

Plea made good by Verdict. Nota.

An Action of Debt brought against an Executor, who pleads, that he had nothing in his hands at the time of the Writ purchased, and saith not, nor any time after the Plea, is not good; but if the Plaintiff had took Issue, that he had Assets at the Day of the Writ purchased, and it had been found for the Plaintiff, now the Plea is made good.

If an Action of Debt be brought against two Executors, and one of them onely appear, and confels the Action, the Judgement shall be against both of them, of the Goods of the Testators in the hands of all the Executors, and the Damages of him that appeared onely.

**T***Rin. 16. Jac. rotulo 988. Houldsworth versus Barker.* An Action of Debt brought upon a Bill, the Defendant pleads the Bill was delivered to the Plaintiff, upon a Condition not performed, and it was held a naughty Plea by the whole Court.

*Judgement against both of the Testators Goods, and Damages of him that appeared onely.*

**H***Ill. 13. Jacobi rotulo 842. Harrison & al. at the Suit of Fleet.* An Action of Debt brought for 32*l.* and the Plaintiff counts upon an *Emisset*; *Harrison* pleads, that he and the other do not detain from the Plaintiff the said 32*l.* nor any Pennythereof; and the other pleads to Issue, and a special Entry made, that the Issue should remain, untill the said *Harrison* had perfected his Law, or made Default, and he at the Day did wage his Law, and Judgement was, that the Plaintiff should take nothing by his Writ.

*Nota.*

*Nota.*

**P***Asch. 16. Jac. rotulo 1200. Rayson versus Winder.* An Action of Debt brought upon an Obligation, with a Condition to perform an Award, which was good in part, and void in part, and the Breach assigned upon the good part, and the Award was to pay Money, but no time of Payment, & afterwards it was demanded, and the Award is good.

*If no time of Payment in an Award due upon Demand.*

**C***Asington versus Burcher Knight, Turner, Jones, and Bowden, for 1800*l.** *Burcher* was outlawed, *Turner* and *Jones* appeared by *Superfedeas*, and *Bawden* appeared by another Attorney, and the Plaintiff declared against them three that appeared upon an Account; *Turner* offered to wage his Law, and the others plead *Nil debent per patriam*; and the Court was moved pretending that *Turner* shal not be admitted to wage his Law, because the Defendants should not sever in Plea, but the Court upon sight of divers Prefidents were of another opinion, although it was urged that *Turner* & *Jones* joyned in a *Superfedeas*, and therefore pretend that *Turner* should not sever in Plea from *Jones*, that pleaded *Nil debet per patriam*, but that Exception was disallowed, for although two appear by *Superfedeas*, yet they may vary in Plea.

*Though two appear by one Superfedeas, yet they may vary in Plea.*

**M***Ich. 16. Jac. rotulo 381. and the Imparlance entred, 16. Jac. rotulo 1727.* An Action of Debt brought by *Lee* versus *Arrow-smith* upon an *Emisset*, for divers Parcels, and upon an Account, and the Parcels, and Account amounted to the summ of 300*l.* but in the Imparlance Roll, the Parcels and summ accounted for, did not amount to 300*l.* by 6*l.* And this variance was moved in Arrest of Judgement after

*The Imparlance amended after Trial, upon the Attorneys Oath.*

after a Verdict, but the Court were of opinion, that it was amenable, because *Ball* the Attorney made Oath, that he commanded his Clerk to sum the Account for 6*l.* to maintain his Writ, and therefore the Roll was amended.

Nota.  
Bene case.

**H**ill. 36. *Eliz. rotulo* 1908. Action of Debt brought by *Gage* versus *Gilbert*, upon an Obligation for 500*l.* bearing Date, first of *February*, Anno 25. *Eliz.* The Defendant pleads a general Release made to him by the Plaintiff, bearing Date after the making of the Bond, of all Dues and Demands whatsoever, except an Award made between the Plaintiff and one *G.W.* why *R.R.* then dead, and one Obligation of 500*l.* for performance of the said Award, bearing Date 29. *April*, 25. *Eliz.* and whether these words (bearing Date 29. *April*) shall have reference to the Arbitrement, or Bond, was the Question, upon a Demurrer upon the Replication, in which the Plaintiff shewed the special matter that the Award was made the 29. *April*, and that the Bond was made the said first of *February*, and it was adjudged that these words, bearing Date, should have reference to the Award, and not to the Bond.

And if the Heir pleads *Ciens per discent*, besides one Acre, if the Plaintiff please he may have Execution of that Acre; or if the Plaintiff plead that he hath Assets beyond that Acre, and it be found that he hath ten Acres more, the Plaintiff shall have Execution of the Land only, and not of his person: as it is where the Heir pleads, that he hath nothing by Discent generally, and it is found against him, that Land, and all other his Land which he hath, and his Body are liable to the Judgement, by a *Capias ad satisfaciend. Fieri facias*, or *Elegit*.

A Servant hired to serve beyond Sea may have his Action in England.

If a man be retained in *London*, to serve beyond Sea, he may have his Action for his Wages in *England*, in any County. And the like of an Obligation bearing Date at *Roan* in *France*, it may be sued in *England*, alledging the place to be in such a County, where he brings his Action.

Nota,

And note, that Debt may be brought in the Common Pleas, without Original, against any Officer or Minister of the said Court, by Bill exhibited to the Court, but no Process of Outlary lies upon that; and the Judgement upon that, is, that the Plaintiff shall recover his Debt, and Costs, and shall have an Attachment, *ad satisfaciendum*, but no *Exigent*; for because it is not by Original; and all the Process by Bill shall be returnable at a Day certain: but no Bill lies against a Serjeant at Law. And note, that the Judges, Serjeants, and Officers, Clerks, Attorneys, and Ministers of the Court may have an Attachment of Priviledge out of the said Court, without an Original to arrest any to them indebted, or for any personal cause to proceed upon

on



on it, as if it were by Original, but no Process of Outlary lies thereupon, and such Process of Attachment shall be returnable at a Day certain, and not at the common Return, and they may be returned from Day to Day.

If a man be bound to perform an Award of Arbitrators, and they make an Award accordingly, that one shall pay Money, he may have his Action of Debt for the Money, and declare upon the Award: and afterward may have another Action upon the Obligation, for not performing the Award, by the opinion of the whole Court, *Mich. 5. Caroli.*

Nota.

An Action of Debt brought by an Executor; the Defendant pleads an Outlary in the person of the Executor, and demands Judgement, if he ought to answer his Writ; the Plaintiff demurs in Law to that Plea; and Judgement was given, that the Defendant should answer over.

Outlary in the Executor, no Plea.

**W** *Orly* versus *B.* and his Wife, *Trin. 37. Eliz. rotulo 1306.* An Action of Debt brought by Husband and Wife as Executrix: the Defendant pleads in Barr an Outlary in the Testator by an Estranger, which is in its force; and upon a Demurr and solemn Debate, adjudged a naughty Barr. *Trin. 40. Eliz. rotulo 507.* The like Plea pleaded to an Executor that brought an Action of Debt, and adjudged no Plea. And *Dixon* Administrator of *Collins*, exhibited a Bill against *Fawden* an Attorney of the Common Pleas, and he pleads in Barr an Outlary against the Administrator, and adjudged no Plea.

Outlary in the Testator in Barr, adjudged naughty.

**M** *Ich. 4. Ed. 4. rotulo 144.* An Action of Debt was brought against *J. R. de W. in Com. L. Chapman*, the Defendant appeared by his Attorney, and offered to wage his Law, and essoyned; and at that Day the Plaintiff appeared, and the Defendant being solemnly required, one *J. R.* came to answer the Plaintiff as Defendant in that Action, in his proper person, and offered to wage his Law; the Plaintiff said, that *J. R.* now appearing to wage his Law, ought not to be admitted, because the said *J. R.* is not that person which the Plaintiff prosecutes, because this *J. R.* appearing, is *J. R. de W. in Com. L. Jun. Chapman*, and he who the Plaintiff prosecutes is *J. R. de W. in Com. L. Sen. Chapman*, both of them at the purchasing the Plaintiffs Writ, living at *W.* and that he agreed with the Defendant so to do, therefore because *J. R. de W. in Com. L.* hath not appeared to wage his Law, prays Judgement: the Defendant confesses such matter, and sayes, that he beleiving that the Writ was prosecuted against him, appeared by his Attorney, and offered to wage his Law; and prays to be discharged of the Debt: and the other *J. R.* being exacted, appeared

A wrong man of the same name offers to wage his Law.

appeared not : and the Court would advise, but no Judgement for the Plaintiff.

*Lessor and Lessee for years, one Assignes his terme, and the other grants his Reversion, Grantee of the Reversion shall have Action of Debt against the Assignee.*  
Nota.

**H**ill. 26. Eliz. rotulo 420. The Lessor makes a Lease by Indenture for years, and the Lessee grants over his whole Terme ; and the Lessor grants over the Reversion, and it was adjudged that the Grantee of the Reversion should have an Action of Debt for the Arrears of Rent, against the Assignee of the terme, and not against the first Lessee.

**H**ill. 43. Eliz. Pasch. 41. Eliz. rotulo 425. An Action of Debt brought against an Executor in the *Debet & detinet*, for Rent due in the time of the Executor, upon a Lease made to the Testator, upon a Judgement given in the upper Bench, and that Judgement was reversed in the Exchequer, because it was not in the *Detinet* alone ; but afterwards in the upper Bench. *Int. dominum Rich. & Frank* Administrator for Arrears due, after the Death of the Intestate, it was adjudged good in the *Debet & detinet*, and also in the Common Pleas, Trin. 11. Jac. rotulo 2013,

Nota.

**M**ich. 30. & 31. Eliz. rotulo 907. An Action of Debt brought, to which the Defendant pleads an Outlary against the Plaintiff in its force, the Plaintiff replies the general Pardon granted by Parliament ; the Defendant demurrs, and Judgement, that he should answer over.

*Default of the Clerk amended, and afterwards upon advice made as it was at first.*

**M**ich. 40. & 41. Eliz. *Ralph Rogers* brought an Action of Debt upon an Obligation of 400*l.* and Judgement was entred by the Clerk upon a *Nichil dic.* that the said *Roger* should recover, &c. and for that Default the Defendant brought his Writ of Error to reverse the Judgement given for *Ralph* ; and when the Record was certified, the Judges of the then Kings Bench would not proceed. And afterwards the Judges of the Common Pleas upon a motion, and before another Writ of Error brought, amended the Mistake of the Clerk. And Justice *Walmesley* would have committed *Keale* the Clerk to the Fleet, for his carelesness, but afterwards the Amendment was withdrawn by the Court, and upon further advice, the Roll made as it was before.

*A Bill to pay Money upon Demand, must lay a special Demand.*

An Action of Debt was brought upon a single Bill for Payment of Money upon Demand, and the Plaintiff declares generally, that he often had requested, &c. and Serjeant *Harris* demurres to the Declaration ; and the opinion of the Court was, that he ought to plead : yet if the Defendant had demanded Oyer of the Bill, and upon that have demurred, it had been a good Demurrer, because one special

cial Demand was in the Bill, and no special Demand alleadged in the Count.

**M***Ich. 3. Jac. Burnell versus Bowes.* Action of Debt brought upon a Bond, and the Plaintiff in the Impar lance Roll had counted upon a Bond made the tenth of *March*, and an Impar lance thereupon untill the next Terme, and in the next Terme he declared, as of a Bond made the tenth of *May*, and the Defendant pleaded *per Dures*, and it was entred of Record, and the next Terme after Entry thereof the Plaintiff moved that that Mistake might be amended, and at first it was denied to be amended, because the Defendant had pleaded to it, and by that Amendment his Plea should be altered, as if he had pleaded, that it was not his Deed; and the cause of his pleading that Plea was the the Mistake, and if that Mistake should be amended, he would be trised and overthrown; and upon the first motion it was denied to be amended, but afterwards granted to be amended by the whole Court, for the Impar lance was entred, *Hilary*. first of *James*, and the Issue was *Pasch.* second of *James*, but the Defendant was admitted to plead a new at his pleasure.

*Amendment of Issue Roll by the Impar lance Roll.*

**M***Ich. 3. Jac. rotulo 2575. Fitch versus Bissie.* An Action of Debt brought upon an Obligation, with a Condition to pay Money yearly, according to the forme and effect of the Indenture made between the Plaintiff and Defendant; the Defendant pleads that there was not any such Indenture made between the Plaintiff and Defendant, as is in the Condition supposed: and the Plaintiff demurs upon that Plea, for that the Defendant is estopped to plead that Plea.

*Estoppel.*

**K***Ing* and his Wife Executrix of *J. Wright*, Plaintiffs, brought a *Scire facias* after the said Executrix came to full Age, against *Death* and his Wife, Administratrix of *W. D.* to have Execution of a Judgement had by *J. D.* and *H. E.* Administrators, during the minority of the Executrix, upon a Bond entred into, to the Testator, and whether a *Scire facias* lay by the Executrix or no, was the Question; and by the better opinion of the Court it did not lie.

**M**ayor and Burgesses of *Linn Regis*, in *Norfolk*, *Mich. 10. Jac. rotulo 2413.* brought an Action of Debt upon a Bond against one *Pain*, and it was (*Ad respondendum Majori & Burgensibus de Linn Regis in Comitatu Norfolcia.*) *Pain* pleads, that it was not his Deed; and a special Verdict was found, that the Mayor and Burgesses were incorporated by the name of *Majores & Burgenses Burgi de Linn*, & non per aliud. And whether the omission of this word (*Burgi*) should barr the Plaintiffs, was the Question: and Judge-

ment was given by *Cook*, *Warburton*, and *Nichols*, for the Plaintiff; for *Cook* said, that if the essential part of the Corporation was named, it was sufficient: and in this case the Mayor and Burgessees was one essential part, and *Linn Regis* is another essential part, and those two were duly expressed, and sufficient to maintain the Action; and *Cook* said, that those words (*Et non per aliud*) shall be intended to be *Non per aliud sensum & non litera*; and of the same opinion were the other Judges there.

**N***ichols* versus *Grimwin*, *Mich. 12. Jacobi, rotulo 1609.* or *Hill*, in the same year, *rotulo 3027.* The Plaintiff brought his Action upon a Bond, the Condition whereof was performance of an Award, for and concerning all matters, Causes, Suits, and Demands whatsoever, had, moved, or depending, &c. so as the said Award be made, &c. The Defendant pleads no such Award made, the Plaintiff by Reply sets forth the Award, it was made *De premissis*, to wit, that the said *I.* should clearly depart with, and avoid out of her House, in which she then lived, and that the said *I.* should carry away all the Hay, &c. The Defendant re-joynes, and sayes, no such Award; and a Verdict for the Plaintiff; the Defendant moved in Arrest of Judgement; for that the Award was made but of one part, and so void; but Judgement was given for the Plaintiff; for though the Award be made but of one part, yet if the Defendant may plead it in Barr of the other Action brought against him for the same cause, in all such cases the Award is good. But my Lord *Hubbart* and *Nichols* took this Difference upon these words (so that) for then the Arbitrators must make their Award of all such things which are in Controversie, and in such manner as the Condition prescribes; but if the Parties put themselves by Parroll, if the Arbitrement be made of one part it is good. And *Hubbart* said, that in all Arbitrements, whether by Bond, or Parroll, they ought to be reciprocal, and to be made in such manner, that it may make an end of all Controversies between the Parties. For if a man be bound in a single Bill, and put it to Arbitrement, and the Arbitrators order that the Obligor pay to the Obligee a sum, and do not award that the Obligee shall seal a Release, or that the Money paid shall be in Discharge of the said Bill, the Award is void. But in *Barpools* case the Submission was by Parroll, for Money due before the Submission; and the Award was, that he should pay such a sum for the same Debt, and good; for the Award shall inure to a Discharge. See *Paschals* case, 8. *Rep.*

**S***tusfield* Plaintiff, *Grony* Defendant; in *Trinity Terme, 13 Jacobi, rotulo 859.* The Defendant pleads to a Bond taken by the Sheriff for his Appearance in the Kings Bench, *Die Sabbati proximum post Oct.*



*Oct. Martini*, that he appeared at the Day; and the Court of Common Pleas gave him a Day to bring in the Record of his Appearance by *Mittimus* issuing out of the Chancery, the Record was certified, *Videlicet*, that he appeared *Luna post xv:am Martini*, which was after the Day, yet it was adjudged good; for if the Appearance was the same Terme, it is good, though it be not the same Day.

*Serle* against *Harris*, *Trinity Terme*, 9. *Jacobi*, rotulo 1321. Judgement is there entred by *Non sum inform.* against *Harris*, *Harris* brings a Writ of Error upon that Judgement, and assigns for Error, that the Record was *Fr. Harris de Brownton.* and the Original filed to warrant that Judgement was *Fr. Harris de Brownton*, and there reversed for that Variance.

*Hamond* versus *Jethrell*, *Mich. 8. Jacobi*, rotulo 2354. *Hamond* brought his Action of Debt upon a Bill obligatory, for the Payment of Money, and no Day limited in the Bill for the Payment thereof: but after the words (In witness whereof, &c.) these words were written, Nevertheless it is agreed, that the said *Jethrell* shall not be hereby compelled or required to pay the said 30*l.* untill the said *Jethrell* have recovered against *B. Hudson* the sum of 30*l.* or more, upon a Bond of 40*l.* wherein the said *Hamond*, &c. The Defendant demands Oyer of the Bill, and hath it, *Memorandum* that *J. W. J. &c.* and demurs in Law, and shews that the Plaintiff had not alleadged any Day of Payment, nor when it was requested; and the Declaration adjudged good notwithstanding: and my Lord *Cook* held, that whatsoever comes after these words, In witness, &c. is no part of the Bill, but words after, In witness, &c. may be a Condition, and must be pleaded, and not demurred upon: and 21 *Henry* the sixth, direct in this point; and so the third Report. An Action of Covenant brought upon words of Covenant in an Indenture after In witness, &c. and above the Seal, and held good and maintainable.

*Saint-John* versus *Cracknell*, *Mich. 12. Jacobi*, rotulo 1153. An Action of Debt was brought upon the Statute of the 24. of *Henry* the sixth for 40*l.* for Election of Burgesses in Parliament; and it was tried, and a Verdict for the Plaintiff. And Serjeant *Moor* moved the matter insuing in Arrest of Judgement. First, the Statute directs the Sheriff to issue out his Warrant to the Mayor, if there be one, and if no Mayor, then to the Bailiff: and it appeared by the Court that the Sheriff made his Warrant to the Bailiff, and do not shew that there was no Mayor there: and the Exception disallowed; for if there was a Mayor, the Defendant ought to shew it by Plea. Secondly, that the

Plaintiff doth not alleadge that the Warrant made to the Bailiff was under the Sheriffs Seal, as the Statute directs: and the Court held the Count good notwithstanding, because the Declaration was, that the Sheriff by vertue of a Writ to him directed, made his Warrant to the Bailiff: and if it was by vertue of the Writ, it shall be intended to be under his Seal.

**H**ope versus Holman, *Mich. 10. Jacobi, rotulo 3612*. Debt upon an Obligation, the Defendant pleads a forreign Attachment in London, and the Plaintiff demurrs, and the Exceptions were; first, that the Defendant had attached the Moneys in his own hands by way of Retainer, and so the Custome unwarrantable. Secondly, it appeared that Judgement was given in the Mayors Court, by the Default of him in whose hands the Money was attached: and it appeared, that the Defendant which brought the Action in London, and he in whose hands the Attachment was made, and that made Default, was the same person; and it is a contrariety, that the same person should appear and not appear, and a Prescription for that is naught; and the Custome is in London, that the Recoveror in London ought to finde Sureties, that if the Debt be discharged within a Year and a Day, then to pay the Money, and did not appear by the Record, that he found Sureties, which was an incurable Fault, and so adjudged by the Court.

**P**otter versus Tompson, *Hill. 14. Jacobi, rotulo 3449*. To one Obligation with Condition to make Assurance of Lands to such Uses therein expessed; the Defendant pleads, that he made a Feofment of the same Lands to other Uses, which the Plaintiff accepted; the Plaintiff demurrs, and it was adjudged a naughty Plea; for he ought not to vary from the Condition.

**H**iggenbotham versus Armat, *Hill. 8. Jac. rotulo 906*. Action of Debt brought upon a Retainer, in the Office of an Husbandman for one year, and so from year to year; the Defendant wages his Law, and at the Day to wage his Law, the Court refused to accept it, for that he ought not to wage his Law for Wages; yet if the Retainer were not for a year at least, the Court seemed to be of opinion that he might wage his Law.

**V**ernon versus Onslow, *Pasch. 12. Jac. rotulo 1047*. Upon an Action brought upon a Bill for 80*l.* the Defendant demands Oyer of the Bill, was *Pro octogesima libris*, and to that the Defendant demurrs, and Judgement for the Plaintiff. Hutton cited the Case in *Cooks* 10. *Resp.* Rowlands Case. And another in *Mich. 44. & 45. Eliz. rotulo*

*rotulo 131. Pro septingentis libris*, and the Bond was *Pro septingentis libris*. And another, *Mich. 11. Jac.* upon a Bill for seventeen pounds, and adjudged a good Bill.

**Y**oung versus *Melton, Trin. 10. Jacobi, rotulo 3434*. An Action brought upon a Bond for performance of Covenants; the Defendant pleads Conditions performed. The Assignes, the Breach for non-payment of Rent, and pleads in this manner, that in *December* he demised to the Defendant one Wine-Cellar, &c. for one year; and if the Defendant would hold the Wine-Cellar for three years paying 40*l.* yearly during the said terme; and alleadges non-payment of the Rent of one Quarter in the first Year: and the Defendant demurrs; and the Court were of opinion, that the reservation had reference as well to the first year, as to the two years following: and in that case *Cook* said, that if a man demise, &c. reserving Rent to himself, the Heir shall not have the Rent, but if the Rent be reserved generally, the Heir shall have it.

**W**ickstead versus *Bradshaw, Pasch. 14. Jac. rotulo 2175*. There was Judgement entred against the said *B.* and after the Bail of *Bradshaw* brought a *Habeas Corpus* to the *Marshalsey*, *Bradshaw* being a Prisoner there, to have his Body before the Judges of the Common Pleas to be committed in Execution, in Discharge of the Bail, but before the Returne of the *Habeas Corpus*, the said *Bradshaw* had brought a Writ of Error returnable the Day following; and when he came to be committed, the Court doubted, that their hands were tied by a Writ of Error, by reason he could not be committed upon the Judgement, and yet they would have discharged the Bail, if they knew which way, therefore *Quare*.

**G**errard & al. versus *Dannet, Hill. 9. Jac. rotulo 2015*. Judgement was had upon a Bond by *Non sum inform.* and a Writ of Error brought for that the Christian name of the Defendant, Attorney was left out in the Imparance Roll; but it was in the Roll, whereupon the Judgement was entred, and a Warrant of Attorney entred accordingly: and the Court was moved, that it might be put into the Imparance Roll, which was granted upon sight of the Judgement Roll, and Warrant of Attorney entred.

If a man be bound by Award to pay one 20*s.* And I at the Day offer it, and he refuseth it, or comes not to receive it; I must plead that I was ready to pay; and shall not plead an *Uncore prius*. because it is upon a collateral matter.

An Obligation was made to pay 10*l.* 8*s.* and eight (not saying Pence, or any thing else) An Action of Debt lieth for the 10*l.* 8*s.*

*Wilde*

**W**ilde versus Vinor, Trin. 7. Jac. rotulo 1629, or 2629. Debt upon an Obligation to perform an Award. The Defendant pleads, that the Arbitrators made no Award; the Plaintiff replies, that the Defendant by Writing did revoke, and null the Authority of the Arbitrators. Foster held the Bond was forfeited, although he might revoke, the Plea was that he did discharge the Arbitrators against the form of the Condition. My Lord Cook held, that the Power was countermandable, if the Submission be by Writing, the Countermand must be by Writing, if by word I may countermand by word. If two binde themselves, one cannot countermand alone. If Obligor or Obligee disable by their own Act to make the Condition void; the Bond is single, 14 H. 7. If I am bound to infeoff A. and I marry her before the Day, the Bond is forfeited, 18 E. 4. 18. 20. the great doubt was, because no express notice, but notice was implied. And the Bond forfeited, because he did not stand to it. Judgement for the Plaintiff.

**P**arker versus Rennaday, Trin. 6. Jac. Action brought upon a Bond for 60*l*. the Bond was in Italian in these words, *In cessante libris*, and held a good Bond for 60*l*.

**O**K. ux. ejus Admin. versus Needham, who was bound to the Intestate in a Bond, and pleads, that Administration of the Intestates Goods was committed to him by the Archbishop, the Intestate having *Bona not Abilia*, before it was committed to the Plaintiffs Wife. The Plaintiff replies, that the Administration committed to the Defendant was revoked and made void; to which the Defendant demurs, pretending his Administration to be a Release in Law, but it was otherwise adjudged. But if the Debtor were made Executor, then the Debt is released: like unto an Administrator during the minority, he may do all for the good of the Infants, but nothing to their prejudice, if an Executor marry the Debtor, it is no Release in Law: Judgement for the Plaintiff by the whole Court.

**L**Awrance and Althams case; if I have no means to gain my Right but by Action if I release my Action, I release the thing it selfe, because I release my means to come to my Right. If I release all Actions I may have *ius prosequendi*. A Release made by the Testator shall be no Barr to the Executor to bring a Writ of Detinue, because it continues a wrong still to the Executor. A Bond to pay Money at Michaelmas, may be released because it is a Debt, otherwise it is of a Rent reserved by Lease: the like it is of a single Bill to pay Money at four Dayes, if the first Day be broken no Action, untill all the Dayes be past; but in case of a Lease, after the first Day, Debt doth lie; in the

Adm. not Dis. Trin. 7. Jac.  
D. 7. 6. 2. 1. 2. 3.  
See 6. 11. 12.



the first it is a Debt, but not in the other. Quarrels, Controversies, and Debates are all one, that is all Causes of Quarrels, Controversies, and Debates, are more large then Actions: and Suits are more then *q. c. & d.* and by Release of Suits, Executions are gone, Release of Duties Executions are gone: neither Fraud nor Might can take a Title without Right. Demand is most large, and by it Rents are gone, Executions gone, Incidents gone, as Releif, Warranties gone, all Causes of Demand gone, Actions and a mans Right gone.

When a condition is to arbitrate of all matters between, &c. there if the matters be not made known to the Arbitrators, they are not bound to arbitrate more then they know for, if it appear to the Court that all matters committed to the arbitrators be not arbitrated, the Award is void; but if the submission be of all matters between, &c. so that now all must be arbitrated, or else it is void: and in every award there must be satisfaction of that which was awarded.

**P***owel versus Crowther trin. 9. Jacob. rotulo 313. det port e. un.* three executors, which appeared at several terms, and plead severally, *ne unques execut.* the plaintiff proceeds to triall against one of them, and was non-suit. And then one of the other defendants take the record down by proviso, and the plaintiff was again non-suit, and both the defendants desire costs, before the third issue was tried: but costs was onely given to the first, and denied to the second, for his trial was erroneous, because by the first triall the originall was determined.

If a defendant wage his law, no excuse of sickness, or water, can save his default; but in real actions he may excuse himself by such accidents.

If the condition of a Bond be to discharge a messuage of all incumbrances, there one may plead generally that he did discharge it of all incumbrances; but if it be to discharge it of such a Lease, there he must shew how.

**N***orton versus Sims Pasch. 11. Jacob. rotulo 346.* debt upon a Bond entred into by an under Sheriff to his high Sheriff, that the under Sheriff shall not meddle with the execution of executions, and shall discharge the Sheriff from all escapes, and the plaintiff shewes a breach in the under Sheriff for an escape; by reason whereof, the Sheriff paid the debt and damages: question was, whether this covenant be good, or not Judgment for the plaintiff. A high Sheriff may make an under Sheriff to be at will. An under Sheriff hath the same authority an high Sheriff hath: it is a void condition to save a man harmless from all men, but good, if it be special: if the condition be to discharge and acquit, I must shew how: An under Sheriff was before the

the Conquest. A Bond made to the Sheriff by the under Sheriff, to discharge of all escapes, this is good and lawful. If any part of the condition of a Bond be against a Statute-law, it is void in all: but otherwise, if part be against the common-law. See *Boswells* case 10. *Rep.* when a man is under Sheriff he may do all ministerial things the Sheriff may do, but not judicial. If the under Sheriff will covenant, that he will not meddle with executions above 20*l.* this Covenant of his own accord is good: if a Sheriff binde his under Sheriff, that he shall not return *Venire Facias*, nor intermeddle with executions, untill he be acquainted, it is against Law, and naught by all the Court. A Bond to perform divers Covenants, some against Law, and others lawful, it is good for lawfull things, and void for the rest.

The Death of one of the Parties in an Original Writ doth abate the Writ, it is otherwise in a Judgement. If Husband and Wife sue a *Scire facias*, and the Husband dieth, the *Scire facias* shall abate; for it is no more a judicial Writ, but as it were an Original to revive a Judgement.

The Court were of opinion in the case of Sir *H. Dowckray*, that where he had delivered Money to his Servant to provide Victuals; and the Servant buyes the Victuals in his Masters name, and payes not for them; and afterwards an Action is brought against the Master for the Money, and he offers to wage his Law; and the Court held, he could not safely wage his Law, because the Victuals came to his own use, and therefore he is chargeable, and must have his Remedy against his Servant. But if the Master did forbid the Tradesman to deliver any Wares, except his Man paid for them; in that case if the Tradesman deliver Wares, the Master may safely wage his Law, as it was adjudged in Sir *H. Comptons* case.

Repleader awarded.

**M***Antell* versus *Gibbs*, *Trin. 7. Jacobi, rotulo 1254.* An Action of Debt brought upon an Obligation; to which the Defendant pleads, that an Estranger was imprisoned by another stranger, and kept in Prison, untill the Defendant, as Surety of the stranger, made the Bond; and it was held a naughty Plea, and a Repleader awarded.

Money due upon a Mortgage payable to the Heir, and not to the Executor.

**A***lston* versus *Walker*, *Mich. 6. Jacobi, rotulo 1342.* Land was Mortgaged, and a Promise, that if the Mortgager at such a time and place should pay the Money to the Mortgagee, his Heirs, or Assignes, that then the Mortgage should be void; the Mortgagee died, and the Money was paid to his Executors; and it was adjudged to be no performance of the Condition, for the Executor was not named, and the Money ought to be paid to the Heir, who should have the Land, if the Money were unpaid, and not the Executor.

*Sturges*

**S***Turges* versus *Dean, Trin. 7. Jacobi, rotulo 2915.* An Action of Debt brought upon a Bill for Money to be paid within fifteen Dayes after his Return from *Ierusalem*, he proving his being there; the Defendant pleads, that he did not prove his being there; to which the Plaintiff demurrs, he making proof, that is, if it be true. *Sir Edward Cook* and *Daniel* held, that the proof should be made upon the Triall, and the proof should be subsequent. But *Warburton* and *Foster* held, that the proof shall be precedent, because it was restrained to a certain time: but it had been otherwise if no time had been appointed.

Money to be paid fifteen Dayes after return, &c. he proving his being there, Court divided which proof shall be, precedent or subsequent.

**N***orton* versus *Goldsmith, Trin. 7. Jac. rotulo 3100.* An Action of Debt brought upon an Obligation, with a Condition that *Chamberlain*, his Under-sheriff, should not meddle with Executions beyond such a sum, and alleadges a Breach for intermeddling with Executions, contrary to the Condition; and the opinion of the whole Court was, that the Bond was void.

Condition that an Under-Sheriff shall not intermeddle with Executions of such a value, held void.

**P***ain* versus *Nichols, Trin. 8. Jac. rotulo 134.* An Action of Debt brought upon the Statute of *Ed. 6.* for not setting forth of Tithes, and the Plaintiff declared as well for Prediall Tithes, for he might well bring his Action, and for other Tithes, as of Lamb and Wooll, for which no Action would lie, and upon a Triall the Jury found for all, as well for those that would, as would not bear an Action; and after a Verdict, this Exception was taken, and Judgement arrested.

Judgement arrested, because the whole matter laid was found, and part was not actionable.

**B***ooth* versus *Davenant, Trin. 8. Jacobi, rotulo 805.* A Bail taken in the then Kings Bench, and an Action of Debt brought upon that Recognisance, which was, that if it happened the Defendant in that Action to be convicted, then the Manuaptors granted, and every of them granted, that as well the Debt as Damages, and Costs, which should in that Action be adjudged the Plaintiff, should be levied upon their Lands and Chattels. And in *Easter Terme 7 Jacobi*, the Defendant upon a *Capias ad satisfaciendum*, awarded against him, did not render his Body, but afterwards *Mich. 7. Jacobi*, he did render his Body, and the Court accepted of it, and discharged the Bail: and whether the Bail should be discharged, or not, was the Question; and the Court held, the Bail should be discharged; and Judgement was given for the Defendant.

Bail discharged upon the principals rendering his Body in another Terme after a case returned. *Quære.*

**R***ayson* versus *Winder, Pasch. 16. Jac. rotulo 1200.* An Action of Debt brought upon an Obligation, for performance of an Award, which was void in part, and good in part; and the Breach alleadged for that part which was good, and the Award was to pay

An Award good in part, and naught for part, and Breach assigned in the good part, and held good.

Money, but no time of Payment alleadged in the Award, and afterwards it was demanded, and such Demand was held good.

*If the Plaintiff be non-suit, yet no Cost upon the Statute of Perjury.*

**K**ing versus Law, *Trin.* 16. *fac. rotulo* 507. An Action of Debt brought upon the Statute of Perjury, in which the Plaintiff was non-suit; and the Defendant moved to have Costs upon the Statute of 23 H. 8. upon these words, or upon any Statute for any Offence or Wrong personally, immediately supposed to be done to the Plaintiff or Plaintiffs; and the Plaintiff after Appearance, &c. be non-suited, &c. but the whole Court held; that he should not recover Costs upon that Statute, because the Statute of 5 Eliz. was made long after the Statute of 23 H. 8. and upon the Statute of 7 Jacobi, the Defendant shall not recover Costs; for if the Plaintiff had recovered, he should have recovered no Costs, and so no Cost was given to the Defendant in that Action.

*Nota.*

**P**Annell versus Metcalfe, *Trin.* 17. *Eliz. rotulo* 2722. Action of Debt brought against the Defendant as Administrator, and he pleads a Recovery had against him in the City of Norwich, and alleadges a special Custome, that time out of minde, that they had Cognisance of Pleas; and in pleading the Custome, he omitted this word *Cur.* and held naught.

*Amendment of the Impar lance demed, after Error brought.*

**F**etherston versus Tapsall, *Mich.* 13. *Jacobi, rotulo* 3409. The Impar lance was entred, and *Hill.* 13. *Jacobi, rotulo* 715. The Issue was entred. An Action of Debt was brought upon a Bond, and in the Impar lance the Bond was alleadged to be made at Newcastle, and in the Issue Roll it was alleadged to be made at York, and tried; and afterwards a Writ of Error was brought, and the Record was certified, and upon a *Scire facias* that Error was assigned; and the Court of Common Pleas was moved, that the Impar lance Roll might be amended, but the Court would not grant it.

*A thing out of the Submission awarded, and void.*

**G**ates versus Smith, *Mich.* 16. *fac. rotulo* 945. An Action of Debt brought upon an Obligation to perform an Award; the Defendant pleads, that the Arbitrators made no Award; the Plaintiff by way of Replication sets forth the Award, and that the Arbitrators had awarded the Defendant to pay such a sum, and that he should be bound with another in such a sum, and shews that the Defendant did not become bound with the other; and the Defendant demurred, for because it was out of the Submission, and it was not in the Defendants power to perform it.

*Jackson*



**J**ackson versus Comin, *Trin. 16. Jac. rotulo.* An Action of Debt Nota. brought upon an Obligation to perform an Award, so that the Award be signed, sealed, and delivered: and in pleading of an Award, upon the Defendants saying, there was no Award made; the Plaintiff omitted in his Plea to set forth, that the Award was signed, and it was tried, and a Verdict for the Plaintiff; and this was moved in Arrest of Judgement, and stayed by the Court.

**C**lempton versus Bate, *Trin. 17. Jacobi, rotulo.* An Action of Debt Defendant brought upon a Recovery in a Court-Baron, and declares, that wage his Law every Court was held before the Steward onely, and not before the upon a Reco- Sutors, and a Declaration there for Rent reserved upon a Lease very in a Court years behinde, and the Court held the Declaration void, and that Baron. these words, according to the Custome of the Mannour time out of minde, would not help the Declaration; and the Defendant was admitted to wage his Law presently, if he would.

**C**oventry versus Windall, *Hill. 13. Jac. rotulo 2588.* An Action of Debt brought upon a Writing, thereby shewing that whereas one T. before the sealing of that Writing had become bound to the Defendant, to stay with him, and serve him as his Apprentice for the terme of eight years, and Woodall covenants with the Plaintiff, that he before such a Day would receive and take the said Apprentice for the residue of the said terme of eight years then to come, and would teach, keep, and imploy the said Apprentice in his House and Service in the Art and Mystery of Surgery, which the said Woodall then used, and professed, if the said T. should so long live, and bindes himself in 20. l. the Plaintiff alleadges that the Defendant did receive the said Apprentice in his Service at London, &c. and further sayes, that the Defendant within the time, to wit, such a Day and Year, sent the said Apprentice in a certain Voyage, in a Ship called the *Dragon*, from the House of the Defendant, unto the *East Indies*, there to stay; and that the Apprentice did there arrive, and doth yet there remain, for which he brings his Action. The Defendant pleads, that he for the better instruction of the Apprentice sent the Apprentice to the *Indies*, to use and exercise his Art; and to this the Plaintiff demurrs; and Judgement for the Plaintiff, that the Defendant could not send the Apprentice out of *England*, except himself went with him, although it be in his own House, and own proper Service, but clearly he might send the Apprentice to *Chester*, or any other part of *England*. A man cannot send his Apprentice beyond Sea, except he go with him.

**G**arrard & al. versus Denmet, *Hill. 9. Jacobi, rotulo 516.* The Defendant after a Judgement entred, brought a Writ of Error, and assigned

assigned for Error, that the Christian name of the Attorney for the Defendant was left out in the Imparance Roll, but it was in the Judgement Roll, and also in the Roll with the Clerk of the Warrants was perfect, to wit, *Henry Snag*; and therefore the Imparance was made perfect, and *Henry* put into the Imparance Roll, after assignement of Error by the Court.

Upon a nuli-  
riel, Record,  
though some  
Variances, yet  
the Debt and  
Damages a-  
greeing, Judge-  
ment for the  
Plaintiff.

**C**owchman versus Hawtry, *Hill. 14. Jac. rotulo 2167.* Action of Debt brought against a Bailiff of a Liberty, upon a Recovery in a Court of Record. The Defendant pleads no such Record. The Plaintiff brings the Record into the Court: and there were divers Variances between the Record upon which the Plaintiff declares, and the Record certified, *Videlicet*, in the name of the Bailiff and Continuances; for in the Record certified there were divers Continuances which were not in the Record in Court, and divers other Differences; but the Judgement and Recovery of the Debt and Damages agreed, and the other Variances were not material, and Judgement was given for the Plaintiff notwithstanding:

Bond taken to  
appear in the  
Court of Re-  
quest, void.

**D**ominus Rex Iacobus versus Castle. An Action of Debt brought upon an Obligation taken in the Kings name in the Court of Request, with a Condition to appear before the Master, &c. and the Declaration is generall, that the Defendant such a Day and Year by his Obligation did acknowledge himself to be bound to the King in the said 60*l.* to be paid, &c. and it was adjudged naught, for it did not appear to be taken in a Court of Record.

Return of the  
Habeas Cor-  
pus amended.

**C**hilde versus Peisley, *Hill. 14. Jac. rotulo 2184.* Habeas Corpora returned by the Sheriff, and these words omitted, *Videlicet; Quilibet Iur. per se seperatim Attach. est per Pleg. I. D. & R. R. exitus eor. cujuslibet x.s. R. W. & M. L. Vic.* and it was amended by the Court.

Debt upon two  
Bills, and one  
not due, and  
tried for the  
Plaintiff, and  
moved in Ar-  
rest, the Plain-  
tiff released his  
Damages, and  
had Judge-  
ment upon the  
Bill due.

**A**ndrews versus Delahay an Attorney of the Common Pleas, *Hill. 14. Jac. rotulo 3057.* A Bill filed against the Defendant as an Attorney, upon two Bills obligatory for payment of Money, and one of the Bills was not payable, and due at the time of exhibiting the Bill: and the Defendant pleads to Issue, and the Cause received a Trial, and a Verdict for the Plaintiff; and afterwards the Defendant in Arrest of Judgement moved, that one of the Bills were not payable at the time of exhibiting the Bill against him, and thereupon the Plaintiff remitted his Damages, and had Judgement for the Bill that was due.

**H***arris* versus *Cotton*. As long as the Vicar occupies his Gleab-land in his own hands, he shall pay no Tithes; but if he demise it to another, the Lessee shall pay Tithes to the Parson that is impropriate. If the Vicar sow the Land, and die, and his Executor takes away the Corn, and doth not set forth his Tithe; and the Parson brought an Action of Debt upon the Statute of 2 Ed. 6. and the Court seemed to incline that it would lie.

Lessee of the Vicars Gleab-land shall pay Tithes.  
Nota.

**D***Arrell* versus *Andrew*, Mich. 14. Jacobi, rotulo 2327. An Action of Debt was brought in London for Rent reserved, upon a Demise of Lands in *Cawson* in the Parish of *D.* in the County of *War.* and of one capital Messuage. The Defendant pleads Extinguishment of Rent, because the Plaintiff had entred into one Houfe called the Wooll-house, and into one Buttry at the upper end of the Hall of the said House, and in one House called the *C.* parcell of the Premises before demised, upon the Defendants motion, and had expelled the Defendant out of the Possession thereof, and the *Venire facias* was of *Cawson*, within the Parish of *Dale*, and Exception taken, because it was *Infra Parochiam*: but my Lord *Hubbard* said, that where Land is laid in *Dale*, in the Parish of *Dale*, that the *Venire facias* may be made of *Dale*, or within the Parish, or of the Parish, and both good.

*Venire facias* de *D.* or within the Parish of *D.* or de *Parochia*, good.

**H***all* versus *Winkfield*. An Action of Debt brought in London for a *Hico. l.* and the Plaintiff declared upon a Recognisance taken at *Serjeants Inn* in *Fleetstreet*, London, before the Chief Justice of the Common Pleas, and afterwards inrolled in the Common Pleas at *Westminster*, in *Middlesex*. And the Defendant demurred to the Declaration, and the Question was, whether the Action should be brought in London or *Mid.* And note the Recognisance as soon as it is acknowledged is a Record, and shal relate to the time of the taking to binde. Serjeant *Hutton* said, that a *Scire facias* may issue upon a Recognisance taken out of Court into any County, and none is bound to sue *Scire facias* where the Recognisance is taken: but after it is inrolled in the Court, an Action of Debt shall be brought in the County of *Middlesex*. At the Common Law the Execution was by *Levari facias*, and after the Year an Action of Debt; it is not a Recognisance consummate, untill it be inrolled in the Court, yet it taketh its life by the first acknowledgement: for if you have an Action of Debt or Trespas in a forrain Shire, when you have recovered Debt or Trespas, your Debt or Trespas is now altered and made new. My Lord *Hubbard* held, that if I bring Debt in *Norfolk*, and I have Judgement, and bring an Action of Debt upon that Judgement, it must be brought in *Middlesex*, and so in Trespas. The Inrolment of the Recognisance is but a fortification of the Recognisance.

*Scire facias* upon a Recognisance may issue out into any County.

*Mortimer*

Deprivation of  
a Minister may  
be given in  
evidence.

**M**ortimer versus Freeman, Hill. 9. Jacobi, rotulo 2001. An Action of Debt brought, for not setting out of Tithes, to which the Defendant pleads, *Nil debet per patriam*, and to prove that the Plaintiff was not Parson, he shewed a Deprivation of the Plaintiff for Drunkenness by the high Commissioners: and the Court held, for such a common Fault, after Admonition, the high Commissioners might deprive a Minister; but because this Crime of Drunkenness was committed before the general Pardon, and that the Sentence was given after the Pardon, the Sentence was void. For Wooll or Lamb no Action lieth upon the Statute, for they are not predial Tithes: nor for small Tithes.

Best to have  
Damages seve-  
red upon two  
Contracts.

If an Action of Debt be brought upon two Contracts, and both found for the Plaintiff, in that Case the Jury may tax Damages in-tire, but the safer and better way is to sever the Damages; for it may come to pass, that an Action will not lie for one of the two, and if it will not lie, then your labour and charge is lost.

An Action of Debt brought for 300*l.* upon an Obligation. The Defendant after a general Impar lance demands Oyer of the Bond, and pleads specially, that it was but for 30*l.* and it was not allowed after a general Impar lance. And the Defendant pleaded, that it was not his Deed, which was the proper Plea in that Case.

Breach for not  
acknowledging  
a Fine.

**P**reston versus Dawson, Pasch. 11. Jacobi, rotulo 2310. An Action of Debt brought upon a Bond, for performance of Covenants in an Indenture, in which Indenture was this Covenant following, that the Vendor should make further Assurance at the cost and charges in the Law of the Purchaser; and for Breach it was alleadged, that a Note of a Fine was devised and ingrossed in Parchment, and delivered to the Vendee to acknowledge the Fine at the Assises, which he refused to do, and the Plaintiffs Breach was demurred upon, because he did not offer Costs to the Vendee, and the Court held it to be idle.

Nota.

Feoffment of  
Land in satis-  
faction of Debt  
upon a single  
Bill, held  
naught.

**G**lyver versus Lease, Trin. 11. Jac. rotulo 734. An Action of Debt brought upon a single Bill. The Defendant pleads, that he did infeof the Plaintiff of Lands, in satisfaction of that Debt, and the Plaintiff demurred upon it: and upon reading the Record, ruled to be a naughty Plea to a single Bill, otherwise it had been upon a Bond, with a Condition to pay Money.

A Steward of  
a Leet within  
the Statute of  
E. 6. against  
buying of Of-  
fices.

**W**illiamson versus Barnsley, Trin. 12. Jac. rotulo 1291. An Action of Debt brought upon an Obligation, with a Condition to perform Articles, that he before Easter Terme next following, at the Request of the Plaintiff, should surrender, and yeild up to the Plaintiff, his Letters Patents of the Stewardship of Bromsgrave, to the in-  
tent



tent that he might renew the said Letters Patents in his own name; and it was objected at Barr, that the Office of a Steward of a Court Leet, or Court Baron, was within the Statute of 5 E.6. made against buying of Offices that were for Ministrations: and so *Winch* held the Stewardship of a Leet to be within the Statute, and so was adjudged in *Grays Case*; but the Question was, whether the agreement to surrender, be within the Statute or no, the words of the Statute are, to have and enjoy; and *Winch* said, it was within the Statute; and so the Office of a Curfitor was within that Statute.

Exception was taken to an Action of Debt brought upon the Statute of E.6. for not setting out of Tithes, because the certainty of Loads of Corn were not expressed, but it was held good notwithstanding.

**H***Awes* versus *Birch*, *Hill. 12. Jacobi, rotulo 1843.* An Action of Debt brought upon a Bond of 6*l.* for the payment of 3*l.* upon the 16. of *April.* The Defendant pleads, that an Estranger at the Defendants request, the said 16. of *April,* made an Obligation to the Plaintiff in lieu of the first Debt, and adjudged naught by the whole Court, for one thing in Action cannot be a satisfaction for another thing in Action; but this being done by a stranger, is good by no means.

*One thing in Action cannot be a satisfaction for another thing in Action.*

*Pasch. 12. Jacobi.* The Court was of opinion, that if Money be tendred, and none ready to receive it, and afterwards he to whom the Money is payable, demands the Money, and the other refuse to pay, and afterwards an Action is brought, and a Tender pleaded, the Court held, that the Defendant should pay Damages from the time that the Money was demanded.

*Upon a Request and none ready to receive, and after a Request Damages shall be paid from the Request.*

**F***leet* versus *Harrison*, *Hill. 13. Jac. rotulo 841.* An Action of Debt brought against two Defendants, one of them pleads *Nil debet per patriam*, and the other lets a Judgement go by Default, and he that waged his Law, at the Day appointed performed it; and Judgement that the Plaintiff should take nothing by his Writ, for a *Respectuatur* of the Judgement was entred, untill the other had done his Law.

*Nora.*

**W***illiamson* versus *Spark*, *Mich. 13. Jac. rotulo 3511.* Upon a *habeas corpus* brought against the Bail upon an Attachment of Privilege. The Defendant pleads a Release made after the Verdict, and before Judgement, which was before the Recognisance was forfeited: and if the Recognisee may release before the Damages are ascertained, or no, was the Question, and it seemed he might.

*Nora.*

An Action of Debt brought against a Baker, for a Fine imposed on him

him in a Court Leet, and an Exception was taken, because it was not alleadged that he sold Bread against the Assise of Bread made to sell; for a man may make and bake Bread for his own use, under the Assise limited.

Nota.

**B**acon versus Pain, Trin. 14. Jac. An Action of Debt brought, and declared, that such a Day and Year the Defendant was a Brewer, and for one Year then next following, and that the Defendant the said Day at K. bought of the Plaintiff the fourth part of the Grains that the Plaintiff that Year next following should make in brewing, for 3*l.* to be paid upon Request. The Defendant pleads, that he ought him nothing, and after a Triall, an Exception was taken to the Declaration, because the Plaintiff did not aver that he made Grains in that Year.

An Almoner  
would have  
acknowledged  
satisfaction,  
and doubted.

**L**ord versus Huxly. An Action of Debt brought on a Judgement thereupon, and the Defendant taken in Execution upon that Judgement, and afterwards the Plaintiff became *Felo dese*, by which the Almoner seised of all his Goods, and afterwards the Almoner would have acknowledged satisfaction of the Debt and Damages in that Judgement, and doubted that he could not.

Judgement  
against the  
Plaintiff, for  
incertainty of  
his Count.

**S**awyer versus Crompton, Hill. 14. Jac. rotulo. The Plaintiff brought an Action of Debt for Costs given before the Judges of the *Marsbalsey*, newly erected, 9 Jac. by Letters Patents of the same King within the Virge. And the Plaintiff declared, that whereas at the Court of the said King, for the Household held at S. in S. within the Virge of the Household then at *Whitehall*, such a Day and Year before T. B. Knight Marshall, &c. and F. B. &c. Judges of the said Court, to hear and determine all Pleas personal within the Virge, between Persons not being of the Household, arising, by vertue of Letters Patents, bearing Date such a Day and Year, in due manner made, came, &c. and the Court held a repugnancy in the Count, and the whole Court against the Plaintiff. If it had been brought upon the ancient Court, it must be between two of the Household, and they held that cost lay: and the Exception was, because the Plaintiff had not shewed the Grant to hold the Court.

Nota.

If a Bond be made to one, and he doth not say in the Bond, that it shall be paid to the Obligee, in this case the Plaintiff must shew that it is to be paid to him, though not expressed in the Bond.

Judgement for  
the Plaintiff.

**H**orne Executor of R. Hutton, and E. May, Pasch. 40. Eliz. rotulo 433. An Action of Debt brought upon an Obligation, with a Condition that the above bound T. G. or his Heirs do or shall at any time

time before the Purification of the blessed Virgin, which shall be in the year 1596. according to the Custome of the Mannour, &c. Surrender into the hands of the Lord of the same Mannour for the time being, all those, &c. to the use of the said *R. Hutton*, his Heirs, and Assignes for ever, in such wise as the said *R. Hutton* his Heirs, and Assignes, shall, or lawfully may by the custome of the Mannour be admitted, &c. or if after such Admittance the Premises shall be recovered against the said *R. Hutton* his Heirs or Assignes by one *W. K.* within four years, then if he shall pay upon notice, &c. The Defendant pleads, that the Plaintiff ought not to have his Action, because the said *R. Hutton* after the making of the Bond, and before the said Feast of the Purification, which was in the year 1696. to wit, the sixth of *October* 38 *Eliz.* at *B.* died. The Plaintiff demurs, and Judgement for the Plaintiff.

If one be indebted to one, and he dieth intestate, and after his Death Administration is committed to the Debtor, this is no Release of the Debt. If he marry the Executrix of the Debtee, and the Executrix dieth, the Husband shall be charged with the Debt after her Death.

*Nota.*

**V** *Aughan* versus *Chambers*, *Trin.* 20. *Eliz.* rotulo 145. An Action of Debt brought upon a Bond; the Defendant pleads the Statute of Usury, and shews a corrupt Agreement for Money lent in the year 32. to be paid in 33. and afterwards in 35. a new Bond given for part of the first sum, and it was pretended that this Bond was void; but it was adjudged, because the first Bond was no Corruption, the later should not be.

*Because the first Contract was not usurious, the latter shall not.*

**L** *Eech* Attorney versus *Phillips* Executor of *Phillips*, rotulo 3415. An Action of Debt brought for soliciting a Cause in the upper Bench, and it was adjudged by the whole Court, that an Action of Debt for Solicitors Fees would not lie, but ought to bring an Action of the Case, and afterwards the Court held an Action of the Case would not lie.

*No Action of Debt for Soliciting Fees.*

**P** *Asch.* 12. *Jac.* *Grove* versus *Jourdain*. An Action of Debt brought against an Administrator, who pleads, that the intestate was indebted to him by Obligation, and that he retained the Money in his hands to satisfy the Debt. The Plaintiff replies, that the Money was not due and payable to him at the time of the Intestates Death; and that he took Administration after the Day of Payment; and if the Administrator had pleased he might have took Administration before the Day of Payment: and the Court held the Defendants Plea good, but he shall not have the Forfeiture.

*Defendant pleads, the Plaintiff was indebted to him, and he took Administration, and retained his own Debt in his hands.*

Bailiff of a Colledge claims the Liberty of the University, but denied to him.

**C**Arrell versus Paske, Trin. 13. Jac. rotulo 1018. Debt brought upon an Obligation made at C. in the County of Surry. The Defendant pleads the Priviledge of Cambridge, granted to them by the Queen Eliz. for Scholars, Bachelours, Masters, and their Servants, upon Contract made within the University, and shews the Bond was made in Cambridge, and that he was a Servant of the Scholars, to wit, Bailiff of Kings Colledge in that University, and inhabiting within the Town of Cambridge, and Precincts of that University, and therefore a priviledged Person of the same: and upon reading the Record it seemed, that the Defendant being a Bailiff of the Colledge is not capable of the said Priviledge.

Special Verdict.

**P**Reist versus Cee, Trin. 12. Jacobi, rotulo 2197. An Action of Debt brought upon a Bill, bearing Date 17 November, 1604. by which Bill the Defendant did acknowledge himself to owe the Plaintiff 10. l. to be paid to the Plaintiff at two Payments, to wit, 5. l. to be paid upon the 19. of November then next following, and other 5. l. to be paid upon the 10. Day of December then next following. The Defendant pleads, it was not his Deed. The Jury finde it specially, that the Defendant the 17. of November, 1604. sealed and delivered to the Plaintiff one Bill obligatory, shewed to the Jury, bearing Date the Day and Year above, and finde the Bill, *in hac verba*, Be it known, &c. to be paid at two Payments, that is to say, 5. l. to be paid the 19. of November, which is the present of this Moneth, and the other 5. l. on the 10. of December. The Question was, whether the Bill maintain the Count for the first Payment, and adjudged it did.

Nota, well.

**R**Awdon versus Turton, Trin. 13. Jac. 1011. An Action of Debt brought upon a Bond for Payment of Money such a Day. The Defendant pleads, that he the same Day made an Obligation for the Payment of the said Money another Day, which the Plaintiff accepted for the Money; and Issue taken thereupon, and tried for the Defendant; and after the Verdict, the Plaintiff moved the Court to have Judgement, though the Verdict passed against him, because the Plea was insufficient, and that he confessed the Debt, but the Court would not grant it. The like Mich. 6. Jac. rotulo 1061. And the like Hill. 12. Jac.

Appearance, though at another Day the same Terme saves the Bond.

**C**Arter versus Freeman, Mich. 13. Jac. An Action of Debt brought upon a Bond, with a Condition that the Defendant should appear before the King at a certain Day, *Videlicet, Die Jovis post Octobras Martini*, and upon a Nul.tiel Record pleaded, the Defendant brought his Record of Appearance, *Luna post xvam. Martini*; and this was held by the whole Court an Appearance at the Day in the Condition by the whole Court.

Grubham



**G**rubham versus Thornborough, Hill. 12. Jac. rotulo 1773. An Action of Debt brought for Rent, and for a *Nomine pena* the Rent due 14 November, Anno 9. and no name alleadged for the *Nomine pena*, therefore the Action would not lie for the *Nomine pena*, but it would for Rent. Demand necessary for a *Nomine pena*.

**P**asch. 44. Eliz. Elliot versus Golding. An Action of Debt brought, and Judgement given for the Plaintiff, and a space was left in the Roll for the Costs of the Judgement; and after the Year and a Day, a *Scire facias* was brought to revive the Judgement, and in the *Scire facias* the Costs are put in, and so Judgement by Default; and afterwards a Writ of Error brought, and the Error was assigned, because there were no Costs put into the principal Roll; and afterwards the Record was removed, the Count was moved, that Costs might be put into the Roll, but it was denied upon the first motion, and afterwards Pasch. 13. Jac. it was denied by the whole Court. Costs omitted in the Roll, and Error brought, and demed to be amended.

**B**ond versus Green Administrator. An Action of Debt brought against him as Administrator; he pleads divers Judgements, amounting to 670*l.* and the Assignment of 100*l.* Debt to the King by Deed inrolled; and he pleaded, that he retained his Debt in his hands, and he might have given this in Evidence, or pleaded it at the Liberty of the Defendant. Nota.

**C**ooper versus Bacon. Action of Debt brought upon the Statute of E. 6. for Tithes, and the Plaintiff declares that one was seised of the Rectory of *Elveley, alias, Kirkley*, in *Kingston upon Hull* in his Demesne as of Fee; and being so seised such a Day, and such a Day, at *Elveley, alias, Kirkley*, did demise to the Plaintiff the said Rectory, with the Appurtenances, to have, and to hold, &c. for years, and that by virtue thereof he hath been, and is thereof possessed; and that the Defendant such a Day, and before, and alwayes afterwards hitherto had held and occupied 30. Acres of Land, in *Swandland*, in *Kingston*, in a place called *T.* and that the Tithes did belong to him. The Defendant pleads, *Nil debet per patriam*, and after a Verdict it was alleadged in Arrest of Judgement, that the Issue was mis-tried, because the *Venire facias* was of *Elveley, alias, Kirkley*, and it should have been of *Swandland*, where the Tithes grew. The *Venire facias* mis-awarded.

**C**hapman versus Pescod, Trin. 11. Jac. rotulo 2106. An Action of Debt brought upon an Obligation, with a Condition to give and grant to him, his Heirs, and Assignes. The Defendant pleads, that he hath been ready to give and grant; and adjudged naught, for he must plead that he did it, otherwise it had been, if the words had been as Counsel should devise. The Defendant pleads, that he was ready to grant, and naught.

**M***Ancester* versus *Draper*, *Hill.* 10. *Jac. rotulo* 2613. An Action of Debt brought upon a Bond, with a Condition to pay Money, if *C. R.* shall be then living, and shall before the same 20. Day of *O.* by due form and course in Law perfect, levy, and knowledge a Fine, and a Recovery before his Majesties Justices of his Highness Court of Common Pleas, of and in certain Houses and Tenements, with the Appurtenances which the said *Draper* lately had and purchased of the said *C. R.* the Defendant pleads that *C. R.* was living, and did not levy, &c. and a Demurrer, and the Question was, whether *Draper* or *R.* should levy the Fine, and held, that *Draper* should levy the Fine.

No Demand  
necessary.

**B***Aker* versus *Pain*, *Hill.* 10. *Jac. rotulo* 3139. An Action of Debt brought upon a Bond to pay Rent, and perform all the Covenants, Grants, Payments, and Conditions contained in a pair of Indentures: and the Defendant pleads the Indenture and performance thereof. The Plaintiff assigns the Breach, that the Defendant had not paid the Money. The Defendant replies, that the Plaintiff had entred into part of the Premises the Day before the Day of Payment, and so at Issue upon that; and Exception was taken, because the Plaintiff had alledged no Demand to be made, and the Court held, that was implied by the Issue, and that it was not necessary.

Note this dili-  
gently.

**F***ryer* Administrator of *Mary Costiden*, of the Goods not administered by *Mary Fryer* Executrix of the said *M. C.* versus *Jacobum Gilditch* Executor of *N. Pope*, *Hill.* 11. *Jac. rotulo* 1990. The case was this, two were bound to one, and the Obligee makes the Wife of one of the Obligers his Executrix, and one of the Obligers makes the same Woman Executrix, and she dies, and the Plaintiff takes Administration of the Goods of the Woman not administered; and Judgement was given for the Defendant by the whole Court. If an Executor hath a Lease, and purchaseth the Fee-simple, the Lease is gone, but it shall be Assets in the Executors hands, if a personal thing be once gone, it is extinct for ever. If the Husband had survived the Wife, he should be charged.

Fully admini-  
stred, no good  
Plea by an Ad-  
ministratoe to a  
Scire facias  
to revive a  
Judgement had  
against the In-  
testate.

**H***Arcock* Executor of *HArcock*, versus *Wrenham* Administrator of *Wrenham*, *Hill.* 11. *Jac. rotulo* 1963. A *Scire facias* brought to revive a Judgement had against the Intestate, and the Defendant pleads, *Plene administravit*, which was held a naughty Plea by the whole Court, for he cannot pay so much as Funerals, before he pay the Judgement, and therefore that general fully administered is naughty. The Jury found that the Intestate in trust conveyed one Lease to *Fisher*, and that *Fisher* promised upon the Payment of 300. *l.*

to re-assure the Interest to *Wrenham*, and after his Death the Administrator the Defendant preferred a Bill in the Chancery as Administrator against *Fisher*, and that the Chancery ordered that *Fisher* should pay the Defendant for his Interest in the Lease more then the sum received, the sum of 1060*l.* which was paid the Defendant accordingly; and whether that should be Assets was the Question, and it was held to be Assets. If an Executor make gain of the Testators Money, that gain shall be Assets: the Doubt in this case was, because this was but in Use; and now whether the Court shall take notice of this Use, they shall being found by the Jury, Judgements shall be paid before Statutes or Recognances: and Judgement was given for the Plaintiff: and although in this case the Barr of generally administered be naught, yet an Issue taken thereupon and tried, shall not arrest the Judgement for the Plaintiff.

**P***ease* and *Stilman* Executors, *Hanchet* against *E. Meade*, *Mich.* 11. *Jac. rotulo* 945. An Action of Debt brought upon an Obligation, with a Condition, if *Meade* his Executors, Administrators, or Assignes, or any of them shall pay 20*l.* within the Porch of the Parish Church of *R.* unto such person or persons as the said *Hanchet* shall by her last Will and Testament in writing limit, nominate or appoint, the same to be made in manner, &c. The Defendant pleads that the said *Hanchet* by her last Will and Testament in writing hath not nominated, limited, or appointed, to what person or persons the said 20*l.* should be paid. The Plaintiff replies, and sues, that the Testator made him Executor, and died, and that he took upon him the burden of the Will, and that the Defendant did not pay the Executor the Money: and a Demurrer thereupon. And if it had been to pay to her Assignee, that she should name the Executor should have it: such things as go by way of Executorship shall be to the Executor, without nomination or appointment. *An Executor  
an Assignee in  
Law.*

**S***Tannard* versus *Baxter*, *Trin.* 9. *Jac. rotulo* 1123. An Action of Debt brought for Damages, recovered in an Assise of Nuzans, for stopping the way, before special Commissioners. The Defendant pleads no such Record, and the Record was delivered into the Court by the special Commissioners. *Nota.*

**T***Rin.* 8. *Jac. rotulo.* An Action of Debt brought upon a Bond, with a Condition, for performance of Covenants of an Indenture. The Defendant confesses the Bond, and that after the making the Bond, and before the purchasing the Plaintiffs Writ, the Indenture by the consent and assent of Plaintiff and Defendant was cancelled: and the said Plaintiff cancelled the said Indenture: and it was *Nota.*

was held a naughty Plea by the said Court; for it did appear but that the Bond might be forfeited. For he ought to have pleaded performance of Covenants untill such a Day, which Day the Indenture was cancelled.

Nota.

**B** *Rook* versus *Smith*, *Hill. 9. Jacobi, rotulo 829.* Two Tenements in Common make a Lease, and reserve a Rent and Covenant that neither should release, and one of them releaseth his part, this is a Breach, for that in Debt they both should joyn, and now by the Release the Action is gone.

An Executor by wrong shall not by his Plea prejudice a rightfull Executor.

**L** *Any* versus *Aldred*, and another Executor, *Trin. 10. Jac. vel Pasch. 9. Jac. rotulo 504.* An Action of Debt brought against them as Executors, one pleads that he was Administrator, and that the Administration was committed to him by the Bishop, and pleads a Recovery against him as Administrator, and that he had fully administered, and had no Assets to satisfy the Judgement, and the other Executor acknowledged the Action; and the Plea was held a good Plea: but it was said, the Defendant might have defeated the Action which was brought against him as Executor, and therefore they would infer, that it was no good Plea, but it was a good Plea; and it was held by the cheif Justice, that if an Executor of his own wrong be sued with a rightfull Executor in one Writ, the Executor of his own wrong shall not by his Plea prejudice the rightfull Executor.

Condition of non-payment of Rent to re-enter, the Rent was behinde, but before re-entry accepted the Estate is confirmed by the Acceptance.

**M** *Arsh* versus *Curtis*, *Hill. 38. Eliz. rotulo 132.* An Action of Debt brought upon an Obligation for performance of Covenants in a Lease, upon which Rent is reserved, and the Condition was that if the Rent should be behinde, then lawfull to re-enter, and the Rent was behinde and before re-entry the Rent was accepted. The Question was, whether he may enter for the Condition broken after the acceptance of the Rent. *Sir Edward Cook* was of opinion, that by the acceptance of the Rent he did confirm the Estate, but if a Bond be entered into to perform Covenants in a Lease, whereupon Rent is reserved, and a Fine to be paid, with a Condition of re-entry for not paying the Rent or Fine, and if the Rent be received, and the Fine not paid, the acceptance of the Rent doth not take away the Condition for not paying the Fine.

The Defendants name mis-taken in the Venire, and a new Triall awarded.

**R** *Milton* versus *R. Pearsey*, *Trin. 10. Iacobi, rotulo 445.* An Action of Debt brought, and in the *Venire facias* the Defendants name was mistaken, for the *Venire* was to impannell a Jury between *R. Milton* Plaintiff, and *I. Pearsey* Defendant in a Plea of Debt, and the Court held the *Venire* as none, and a new Triall awarded,



warded, and the like Judgement was given, *Trin. 7. Iacobi, rotulo 787.* in the upper Bench.

**B***Rownsworth* versus *Trench*, *Trin. 10. Iacobi, rotulo 3628.* An Action of Debt brought upon an Escape against a Bailiff of a Liberty, and after a Trial Exception was taken to the Declaration, because it was not alleadged therein, that the Sheriff made a Warrant to the Bailiff upon the Execution, but it was onely alleadged that at *A.* aforesaid, by vertue of the Warrant aforesaid, he took the Prisoner, and saith not, within his Liberty aforesaid, and the Exception was held void.

*Trin. 10. Iacobi.* An Action of Debt brought by Executors, and the Defendant pleads that the Plaintiffs were not Executors, and tried, and found for the Defendant; and the Defendant upon the Statute for Costs desired Costs, because the Jury found against the Plaintiff that he was not Executor; and if a Verdict passe against one that is not an Executor, he shall pay Costs, but Costs were denied by the whole Court, for the Jury might finde an untruth.

*No costs against an Executor.*

**B***Alder* versus *Blackborn*, *Trin. 16. Iacobi, rotulo 465.* An Action of Debt brought for Rent reserved upon a Lease for years, the Case: this Land was devised to a Woman in this manner, that she should have the profits of the Land untill the Daughter of the Devisor should be eighteen years old; and the Woman made the Lease in question reserving Rent, and afterwards married, and then died; and if the Husband after her Death should have the Land untill the Daughter of the Devisor came to eighteen years old, was the question, and adjudged he should hold the Land for the Devise of the profits is the Devise of the Land, and is not like a Lease made by a Guardian in Socage, which ends by the Death of the Guardian; the Declaration was for one Mesuage demised the fourth of *May 15. Jac.* for one year, and so from year to year, as long as both parties should agree, paying twenty four pounds by the year, and *Nil debet per patriam*, was pleaded; and the Jury found it specially that one *I. W.* was seised of the Tenement, and held it in Socage, and made it his last Will in writing, and by that did devise to *A.* his Daughter the said Tenement, and her Heirs for ever, at the full Age of eighteen years; the words of the Will were: *Item*, I will that my Wife and Executrix shall have the Education of my Daughter, with the portion of Money and profits of my Land to her own use without account, untill my Daughters Age aforesaid; provided she shall pay the out-rents, and keep her Daughter at School, and by that Will made his Wife Executrix, and the said *W.* died, and his Wife survived, and took upon

*Devise of the profits of the Land it self.*

on

on her the Executorship and married with one P. the Woman performed the Condition, and afterwards died, and Judgement was given for the Plaintiff, that it was a terme, and that the Husband should have it.

Debt brought  
against an Ex-  
ecutor after full  
age for Goods  
wasted by the  
Administrator  
during his mi-  
nority.

An Action of Debt was brought against an Executor, and the Case was thus, Administration was committed to one during the minority of the Executor who wasted the Goods of the Testator, and after the Executor attained the Age of seventeen years an Action of Debt was brought against the Executor, and the opinion of the Court was prayed whether he might plead generally *ne unques* Executor, or excuse himself by pleading the special matter, and the Court doubled, but most safe to plead the special matter.

An Action of Debt was brought for Rent reserved by Indenture payable at two Feasts, or within twenty daies then next following, and the Plaintiff declared upon a Lease for the Rent, and because ten pound at the Feast of the Anunciation, 10. *Jacobi*, was behind and unpaid, the Action was brought, the Defendant pleads, *Non demisit*, and a Verdict for the Plaintiff, and after a Triall exception was taken to the Declaration because it was not alleadged that the Rent was arrere at that Feast and twenty daies after, but it was not allowed after a Verdict, because he should have taken advantage thereof before.

**R**atliff versus Executors, *Pasch. 15. Jacobi*. An Action of Debt brought upon an Obligation to perform Covenants in an Indenture. The Defendant pleads performance of the Covenants, the Plaintiff alleadges a breach upon this Covenant that the Lessee should enjoy the Land without any lawfull interruption or disturbance of the Lessor or his Executors, and shewes that the Executors entred upon him in the Land, and outed him, and shews not any interruption for any just cause, and adjudged good in the upper Bench.

Release of all  
Demands, a  
good Barr in  
Rent not then  
due.

**W**Hitton versus Bye, *Trin. 16. Jacobi*, It was adjudged in the upper Bench in an Action of Debt brought by a Lessor against a Lessee for years for Rent reserved during the Tearme being behind and unpaid, that a Release pleaded to be made by the Lessor to the Lessee six years before the Rent was arrere, of all Demands, was a good Barr: One cannot reserve a Rent to a stranger it must be reserved according to the privy.

**W**Ainsford Administrator Kirby versus Warner *Trin. 13. Jacobi rotulo 1906*. An Action of Debt brought upon a Bond, to which the Defendant pleads that the intestate was indebted to him in such a sum, and that he retained, &c. in his hands to satisfy himself of the Debt due to him. And that he had not assets over to satisfy the Plaintiff

Plaintiff, to which Plea the Plaintiff demurrs, because he did not plead generally fully administred, but an Exception was taken, because he shewed not that the Condition of the Bond was for payment of Money.

**S**Tone versus Goddard, Trin. 14. Jacobi, rotulo 2258. An Action of Debt brought upon divers Emissets of divers Wares, *Videlicet*, *unum abenum* for five shillings, *unum scabum* for six shillings, and so divers other words which the Court could not understand what they signified, in regard no *Anglice* was put to them: and the Defendant pleaded *Nil debet per patriam*, and the Jury gave a Verdict for the Plaintiff, and Damages given for the whole Debt, and moved in Arrest of Judgement, and Judgement that the Plaintiff should have no Judgement for the insufficiency of his Declaration.

Judgement arrested for improper words without an *Anglice*.

**W**EEKS versus Wright, *unum Clericorum R. B.* The Plaintiff exhibited a Bill against the Defendant for Money due upon an Obligation, and Issue was joyned, and the Cause tried, and a Verdict for the Plaintiff; and after Triall the Defendant moved in Arrest of Judgement, that the Bill was not filed, & that it was not helped by the Statute of *Jeofayles*, nor within that Statute, for it is an Original, but afterwards the Court granted that a new Bill should be filed, so that the matter might be put to arbitrement, and if the Arbitrators could not determine the matter the Court would. And note, the Court seemed to be of an opinion that the want of a Bill is not helped by the Statute.

The want of a Bill not helped by the Statute of *Jeofayles*.

**W**ITCHCOT & LINESLEY versus NINE, Trin. 9. Jacobi, rotulo 726. An Action of Debt brought upon an Obligation, to perform the Covenants contained in an Indenture, the Covenant was for quiet enjoying without let, trouble, interruption, &c. The Plaintiff assigned his Breach that he forbade his Tenant to pay his Rent; this was held by the Court to be no Breach, unlesse there were some other Act; and the Defendant pleaded, that after the time the Plaintiff said, that he forbade the Tenant to pay the Rent, the Tenant did pay the Rent to the Plaintiff.

To forbid no Breach.

**L**EVEL versus HALL, Pasch. 9. Jac. rotulo 805. An Action of Debt brought upon an Obligation, to which the Defendant pleads, that the Plaintiff brought another Action upon the same Bond in London, to which the Defendant there had pleaded *Non est factum*, and it was there found that it was not the Defendants Deed, and in London the Entry is upon such a Verdict, that the Defendant shall recover Damages against the Plaintiff, and that the Defendant should

The Defendant pleads a Plea by which he pretends the Plaintiff to be barred in another Suit, but no Barr.

be without day, &c. but no Judgement, that the Plaintiffe should take nothing by his Writ, and therefore no Judgement to be barred in another Suit, but barr the Plaintiffe, for it is onely a triall, and no Judgement, and the Plea was adjudged naught by the whole Court.

One by his own Election, cannot be Executor for part, and not for part.

**M**ich. 15. Jac. Rotulo 2215. One made another his Executor, and that Executor died, and made another his Executor, and the last Executor refused to own his first Will, as to his goods, and this matter was pleaded in his Action of Debt, brought by an Administrator of the Goods of the first Executor, pretending the Administration was void, although the Executor refused to be Executor, as to the Goods, and the Court held the Administration void, for the Executor cannot be Executor, for part at his own Election, and not for part, and the Defendant pleaded that the Executor should not bring his Action as Administrator, but as Executor.

Tenants in common.

**W**herwood versus Shaw, Mich. 44. and 45 Eliz. Shaw Executor of A. brought an Action of Debt against Wherwood Administrator of Feild, upon a Bill made by Feild to A. by which Feild doth acknowledge himself to have received of one P. forty l. to be equally divided between the said A. and B. to their use, and upon a Judgement given in the Common Pleas, Wherwood brings a Writ of Error and the Judgement was affirmed, the matters moved were, i. because the forty pounds was given to be equally divided between A. and B. therefore they were Tenants in common of it, and Shaw should have joyned B. in the Action with himself, as Tenants in common are to joyn in personall action, but over-ruled, that in this case there were severall Debts, to wit twenty pound to one, and twenty pounds to the other, as in case of ten pounds rent reserved upon a Lease, to wit five pounds at the Feast of Michaelmas, and five pounds at the Feast of the Annunciation, yet it is but one Rent, and this case is not to be resembled to the Cases of Interest, as in the 26 Eliz. where Land or Lease be giuen to two equally to be divided; for there they are Tenants in common. The second thing moved was, whether Debt or account did ly, and adjudged that although no contract was between the parties, yet when either money or goods are delivered upon consideration to the use of A. A. may have an Action of Debt, and of that opinion was Mountain, 28 H.8. in Core and Woods Case, and also there is a President of such Actions of Debt in the Book of Entries.

Debt lies by him to whose use money is delivered.

Debt upon a Statute of Perjury, at a Commission issuing out of Chancery not ly.

**B**road versus Owen, Mich. 44 and 45 Eliz. The Plaintiffe brought an Action of Debt upon the Statute of 5 Eliz. for Perjury against the Defendant; the case was thus, one Low was Plaintiffe against

Broad



*Brode* in the high Court of Chancery, and upon Bill and Answer such matter appeared to the Lord Keeper, that he ordered that one Labourer should become party to the Bill against *Brode*, and afterwards one Commission issued out of Chancery between Labourer and *Brode*, to examine Witnesses, by which Commission *Owen* the now Defendant was examined on the behalf of Labourer, and did depose directly for Labourer against *Brode*, by reason whereof one Order and Decree was made in the Chancery against *Brode*, and for that cause *Brode* brought his Action of Debt against *Owen*, upon the Statute of Perjury, 5 *Eliz.* for one party grieved by the Oath and Deposition of another, and *Owen* demurs in Law; and by the opinion of *Gandy* and *Yelverton* Justices, the Action would not lie, for the words of the Statute are where a man is grieved: and damned by a Deposition in one Suit between party and party, and in this Case it appeared that Labourer was no party to the Suit, but came in by an Order, and no Bill depending either against him, or brought by him, and so out of the Statute, for it is penall and to be taken strictly: and *quare* if he in the Reversion joyn in aid, and is grieved and prejudiced by an Oath and Deposition may maintain an Action of Debt upon this Statute, for he may undoubtedly by the Common Law have an Attaint.

**G***reen* versus *Gascoin*, *Pasch.* 1. *Jacobi*. An Action of Debt brought upon an Obligation for an hundred pounds, to which the Defendant pleads in Barr to the Action an Outlary against the Plaintiff, and shews it incertain, the Plaintiff replies *Nul. tiel*, record; and the Defendant had Day till the next Term to bring in the Record, and in the mean time the Plaintiff reverses the Outlary, by which it is become in Law no Record, according to the 4 *H.7.12.* And *Yelverton* moved the Court for the Defendant, that although in Law there was a Failer of the Record, yet the Defendant ought not to be condemned, but shall answer over according to the 6. of *Eliz.* *Dierfol.* 228. where it is adjudged that Failer of the Record is not peremptory, and so adjudged, for it was no Default in the Defendant, his Plea being true at such time as it was pleaded with mark.

*Outlary pleaded in Barr, and Nul. tiel record pleaded, and in the mean time the Outlary reversed Judgement that the Defendant should answer over.*

**W***eaver* versus *Clifford*. Action of Debt brought for an Escape, the Case was thus upon the *Nichils* returned against a Conusor in Chancery a *Capias* was awarded out of the Chancery against him, by vertue of which he was taken by the Sheriff, and suffered to escape, and adjudged that no Action would lie against the Sheriff in this Case, for a *Capias* lies not upon a Recognisance, but onely a *Scire facias*, and therefore when a man is taken upon the *Capias* he is not a Prisoner by the course of Law, for the Law hath not ordained any

*No Escape lies against a Sheriff upon a Capias upon a Recognisance out of the Chancery.*

means to arrest him, and is therefore in Custody without Warrant, and no Escape, and it is an illegal Commitment, and so is the Statute of *Westminster*, the 2. to be construed which gives the Action against the Gaoler, to wit, where the party is in Execution by courtes of Law, and although the Chancery doth award a *Capias* upon a Recognizance, and that there are divers Presidents of it; yet it is but the use of that Court onely, which may not stop the Judges mouths; but that they ought to judge according to Law, and this was the opinion of *Popham*, *Telverton*, *Gandy*, but *Fennor* doubted, for he thought the awarding of the *Capias* onely erroneous, and not void; and Serjeant *Tanfield* and the Attorney General shewed a precise Judgement in the Case, 21 *Eliz.* in the Exchequer *Clement Pastors* Case, against whom an Action of Debt was brought for suffering one to escape who was taken by vertue of a *Capias* upon a Recognizance, and the three Judges held strongly their opinion.

Request to make  
Assurance generally  
and good.

**P***udsey* versus *Newsam*, *Mich. 1. Jacobi*. An Action of Debt brought upon an Obligation for five hundred pounds, with a Condition, that if the Defendant before *Mich.* do make knowledge, and suffer, &c. all and every such reasonable Act and things whatsoever they be for the good and lawfull assuring and sure making of the Mannour of *D.* to *J. S.* and his Heirs, that then, &c. The Defendant pleads that before *Mich.* the Plaintiff had not reasonably required the Defendant to make any reasonable Act or Acts which should be for the good and lawfull assuring of the Mannour of *D.* The Plaintiff replies, that such a Day before *Mich.* he requested the Defendant that he would convey and assure the Mannour of *D.* to *J. S.* according to the tenour of the Condition, and upon this they were at Issue, and found for the Plaintiff, and it was moved in Arrest of Judgement, that no sufficient Breach was assigned, for the Plaintiff ought to have required one Assurance in certain which he would have had made, but the Exception was over-ruled, and adjudged that the Issue was well joyned, and the Condition broken; for by the Condition the Defendant is to make all and every Act whatsoever for the Assurance of the Mannour of *D.* in so much that if the Plaintiff should request one Fine, Feoffment, or Recovery, or Bargain and Sale, the Defendant ought to make all, but they held he was not bound to make an Obligation or Recognizance for the injoying the Mannour, for that is but collateral Security, & is no Assurance. And when the Plaintiff requires the Defendant to convey the Mannour generally, the Defendant at his peril ought to do it by any kinde of Assurance; and if upon such Request the Defendant should make a Feoffment of the Mannour, yet if the Plaintiff afterwards request one Fine, the Defendant ought to acknowledge one Fine also, and so upon severall Requests he ought

to make severall Assurances, and so in making the Request general, he had well pursued the Condition, and the Defendant ought at his peril to make every Assurance by the opinion of the whole Court.

**E***llis versus Warnes, Trin. 2. Jacobi.* An Action of Debt brought upon a Bond for a hundred and twenty pounds, and the Case upon the pleading was, that *Warnes* was indebted to one *Ader* a hundred pounds upon an usurious Contract, and that *Ader* was indebted to *Ellis* in a hundred pounds, for which *Warnes* and *Ader* were obliged to the Plaintiff, and Debt being brought upon that Obligation, *Warnes* pleads the Usury between him and *Ader* to avoid the Bond; *Ellis* the Plaintiff replies, that *Ader* before the making the Bond was indebted to him in a hundred pounds, a just and true Debt, for Payment whereof *Warnes* and *Ader* were bound to him in the Bond in Suit, and that he was not in any wise knowing of the Usury between *Warnes* and *Ader*, and *Warnes* demurs to this Plea; and adjudged by *Gaudy, Yelverton, and W.* for the Plaintiff, for it is not Usury in the Plaintiff, but onely between *Warnes* and *Ader*, to which the Plaintiff being not privy shall not be prejudiced, for although the Statute of Usury is to be taken most strongly for the suppressing of Usury, yet it must be between such parties as use Corruption, and not to punish the innocent, as the Plaintiff, but if no Debt had been due to the Plaintiff before, then it had been clearly Usury, for there had been no lawfull Cause to make the Bond to him, but onely to countenance the Corruption between *Warnes* and *Ader*; and *Yelverton* said, that if the Defendants Plea be good, then every man may be defrauded of his just Debt; for if the Barr shall be good by Corruption between the Debtor and Surety, to which the Creditor is a meer stranger, a man may loose his Debt, which is mischievous: but *Popham* and *Fennor* doubted of the Plaintiffs Replication, that he ought to have took a Traverse upon the Defendants Barr, which ought not to be; for how should he traverse a thing which could be within his knowledge, and to which he was no party.

**H***Argrave versus Rogers, Mich. 2. Jacobi.* Action of Debt brought, and Bail given, that *A.* upon eight Dayes warning shall appear to an Action to be brought by *B.* for the same Debt; and if *A.* shall be condemned in the Suit, and not pay it, then the Bail would answer *B.* the Condemnation; and *B.* brought his Action against *A.* in which *A.* was condemned, and did not pay, by reason whereof *B.* brought an Action of Debt against the Bail upon the Recognisance, and set forth the Suit against *A.* and the Condemnation, and that he had not satisfied it, but shewed not that it had eight Dayes warning to appear to the Action; and *Fennor* and *Yelverton* held, that he need

not.

Appearance upon  
warning,  
and for de-  
fault adjudged  
naught.

not shew it, for the Condition of the Recognisance depends upon two Clauses, one the Appearance at 8. Dayes warning, the other is the satisfaction by the Bail, if *P.* should not pay the Condemnation comprehended in these words (And) and in this Case the Action was brought upon the second Clause, to wit, the Default of *P.* because he had not answered the Condemnation, and therefore needlesse to meddle with that part of the Condition. But if the Action had been brought, if the first Clause then *B.* ought to have shewed in certain the Warning to have been given by 8. Dayes; but *Popham, Gandy, and W.* were of a contrary opinion, and that the Plaintiff of necessity ought to shew the Warning to have been given 8. Dayes, because that part of the condition is not to be performed between parties, but an Estranger, for *A.* is an Estranger, and the Bail is bound as well to answer such Condemnation in such Action as shall be brought upon the eight Dayes Warning given, for that is the ground of all; and it is no reason that *A.* by his voluntary Appearance without eight Dayes Warning should prejudice his Bail; but otherwise it had been if the Condition had been between *A.* and *B.* for then if *A.* would appear without such Warning, it is his folly, and no injury is done to one that is willing: and according to this opinion the Plaintiff discontinued his Suit, and the Defendants were ordered to put in new Bail with mark.

Action of Debt  
upon the Sta-  
tute of E. 6.  
for Tithes.

**S**ir *Rich. Campion* vers. *Hill*, Pasch. 3. Jac. An Action of Debt brought upon the Stat. of E. 6. for not setting forth of Tithes, & the Plaintiff shews that the Rector of *M.* had 2. parts of the Tithes in 3. parts to be divided, & that the Vicar of the same place had the third part of the Tithes, and layeth this by Prescription, as to the manner of the taking the Tithes, & shews further, how the Parson & Vicar by severall Leases had demised the Tithes to him, & so he being Proprietor of the Tithes, the Defend. sowed 10. Acres within the Parish, to wit, Wheat, Rie, &c. & carried it away without setting forth the Tithe to his Damage, &c. And upon a *Nil debet per patriam*, pleaded, it was found for the Plaintiff, and moved in Arrest of Judgement, that the Plaintiff had in that Action comprised severall Actions upon the Statute, and that it appeared by his own shewing, for the Plaintiff claimed not the Tithes under one Title, but under the severall Tithes of Parson and Vicar; and *Fennor* Justice held they could not joyn, and no more could the Plaintiff who claimed severally under them, and it seemed to him that the Parson could not have this Action against severall Tenants, for not setting forth their severall Tithes, because he could not comprehend two Actions in one; but the whole Court besides held the contrary; for although the Parson and Vicar could not joyn in this Case, because they claim their Tithes severally by divided Rights, yet when both their Tithes are conjoynd in one person; as it is in the

Plaintiff



Plaintiffe, then the the Interest of their Title is conjoynd also in one, and it suffices generally to shew the Plaintiffe is a Farmer or proprietor of the Tithes, without saying of what Title, for it is but a personall action, grounded meerly upon a contempt against the Statute for not setting forth Tithes, and also Tithes are not demanded by this Action, although the Title may come in debate, yet it was agreed by all the Judges, that the Plaintiffe should recover his Tithes in dammages, and shall not demand them again by any suit, after a recovery in this Action, which Mark.

Sufficient to say  
the Plaintiffe is  
Proprietor  
without  
shewing the  
Title.

**B**erket versus Manning, Pasch. 3 Jacobi. Action of Debt brought against the Defendant, as Administrator of J.S. The Defendant pleads fully administred, the Plaintiffe replies that himself had assets and it should have been that the Defendant had assets, and this was moved in arrest of Judgement, but amended by the Court, being the Clerks misprision, onely as where it is entred, & predict. Defend. similiter, and it should have been, & predict. quer. similiter, and this hath been often amended by the Court.

Misprision of  
the Clerk amended  
after Trial

**P**aler versus Hardman Pasch. Jacobi, Hardman and his wife Executrix, J.H. brought an Action of Debt in the common Pleas against Paler, and as that they should restore a tun of Iron, to the value of twelve l. and declare upon a Bill for the delivery of the said tun of Iron within such a time, and that the Defendant had not delivered it to the Plaintiffes damage, of, &c. and upon *non est fact.* pleaded it was found for the Plaintiffe, and Judgement was given that the Plaintiffe should recover the Tun of Iron, or the value of the same, and if he should render the tun then by the oath, &c. should inquire what the tun of Iron was worth, and before any return of the writ to inquire of the dammages, the Plaintiffe in the common Pleas takes out a *Capias* upon the Judgement, and on Exigent upon that, and the Defendant brings a writ of Error, and it was adjudged erroneous, for two causes, first because the Judgement was in the disjunctive, that the Plaintiffe should recover the tun of Iron, and if not the value thereof, so in detinue, as it appears by the Judgement in this Case, that the Plaintiffe may choose whether he will have the Iron or the value thereof, which he cannot do, for if the iron be to be delivered he shall recover that onely, but if it be not to be delivered, then the value, and not as before. Secondly, for that the Judgement is not perfect untill the writ to inquire be returned, with issues to the Sheriffe to distrain the Defendant to render the Iron, and also to inquire of the value, and before the return thereof, nothing in certain appears. One which to ground any writ of Execution for the Judgement comprehends no certainty, but is to be made certain by the

Judgement reversed by writ  
of error being  
in the disjunctive.

return

return of the writ, to inquire with the whole Court granted.

The Plaintiff  
had no Interest  
but the rend-  
ring of the  
Land.

**C**arpenter versus Collins, Mich. 3 Jacobi, An Action of Debt brought by the Plaintiffe for rent arere, and declares upon a Lease made to the Defendant at Will to be held from Mich. as long as both parties should agree, yeelding and paying three pounds yearly, and shews that Collins entred and occupied from the Feast, &c. unto the Feast of Mich. and upon *nil debet plenius*, the Jury found that J. Norrington had issue a Son and a daughter, and Devises, that his Son shall have his Land, at the age of twenty four years, and gives forty pounds to his Daughter, to be paid her at the age of two and twenty years, and further wills that the Plaintiffe should be his Executor, and should repair to his houses, and have the oversight and doing of all his Lands and moveable Goods, untill the severall ages aforesaid, and after dies and Carpenter the Executor makes the Lease before mentioned, and the Jury further find that the Son died, but find not at what age he was at his death, but that the Daughter at the Sons death was nineteen and no more, and find the Lease made by the Plaintiffe, and that the Lessee by force thereof entred and continued possession from Michaelmas for one year and more, and find that within that year, the Daughter entred, and that the Defendant returned to the Daughter, and refused to continue Tenant to the Plaintiffe, and by Fennor, Yelverton and W. Judgement was given against the Plaintiffe, for the Plaintiff took no interest in the Land by the Will, for the oversight and doing of his Lands shall be intended but in Right of the Heire, and to his use, because the Testator though not his Son of discretion and government, untill the age of twenty four years, and in the mean time appointed his Executor to oversee and order the Land to the profits of the Heire that wanted discretion, 28 H.8. D. 26. where it is declared that J.S. shall have as well the governing of, &c. as the disposing, setting, letting, and ordering of his Lands, and by the Court held that J.S. had them onely to husband, for the profit of his children and no otherwise, but he was of opinion that the Plaintiff had an estate in the Land upon a limitation determinable at the Sons age of four and twenty years, and it appears not at what age he died, being not found by the verdict, therefore it is incertain, and the Entry of the Daughter lawfull, for the limitation looks but to the age of the Sonne, and not to the age of the Daughter, for the age of the Daughter shall be intended to be set down for the receipt of her legacy of forty pounds, and for no other purpose, and the Defendant within the time in which the Rent demanded, is supposed to be due, had not determined his Will, as appears by the Verdict: but Fennor and W. said that by the Verdict that the Defendant entred by force of the lease, and occupied the land at the time comprised

fed in the Declaration and more, and that the Tenant at will cannot determine his will, within a little time before the year end, for that would prove very mischeivous to the lessor, that his Tenant at will should determine his will within the year, and refuse to occupy the land, twenty dayes before the year end, and in 21 H.7. Crooks Reports, it appears that a Lessee at will cannot determine his will within the year to the prejudice of the Lessor, but that he shall answer the whole Rent to the Lessor, but note it appeared, that the Lessee at will was expelled by the Plaintiff that was Lessor, and no other thing, although done by his agreement can determine the Lease against the Lessor, for it is Covin if the Lessee be not privy, and acquainted with it, which was granted by the whole Court, and all of them agreed in the Title against the Plaintiff, but as the Reporter affirmed, Popham was absent, and hearing the Case, was of opinion that the Plaintiff had an interest by the words of the will.

Lessee at will cannot determine his will within the year but must answer the whole Rent.

**J**effry versus Guy Mich. 3. Jacobi, An Action of Debt brought upon an Obligation, with Condition, that if Jeffry the Defendant perform all Covenants in such an Indenture, that then, &c. and one Covenant was, that he should permit Guy the Plaintiffe from time to time to come and see if the House Leased by Guy and K. his Wife were in repair, the Case was thus, J. Bill. and K. his Wife were Tenants in Tail of a house, and had Issue, J. B. dies, K. marries Guy the Plaintiffe, and they two make a Lease by Indenture to Jeffry, for twenty years, yeelding and paying to them and their Heirs three pounds Rent by the year, with the Covenant as aforesaid. Jeffry pleads in Barr the former intail, and the death of R. and that VV. the Issue in Tail such a day entred, before which Entry the Condition was not broken, Guy replies that William came with him upon the Land, to see if reparations, &c. and traverses the Entry of William in manner and form, prout, &c. and Issue joyned upon the traverse, and found for the Plaintiffe, and Judgement given in the common Pleas, upon which Judgement Jeffry brought Writ of Error in the Kings Bench, and Judgement affirmed there, but it was assigned for Error, the ~~Jury~~ had not assigned any breach of Covenant in Jeffry, and so had showed no cause of action, but the Court held he need not in this Case, for by the speciall Issue tendred by Jeffry, the Plaintiffe was enforced, one speciall replication to that point tendred, and the Plaintiffe could not proceed error, and it is not like the Case of an arbitrement, wherein Debt upon an Obligation to perform the award, the Defendant pleads *nullum fecer arbitrium*, then the Defendant in his replication ought to set forth the award, and assign his breach, because the Defendants Plea is generall, but if in such Case the Defendant should plead a release of all demands after the Arbitrement.

The Plaintiffe not bound to alleadge a speciall breach, when the Defendants Plea continues speciall matter.

f. cc

f. cc

Arbitrement, by which he offers a special point in Issue, there it suffices, if the Plaintiff answers to the Release, or other special matter alleadged by the Defendant, without assigning any Breach; so in this Case the special Plea of the Defendant had disabled the Plaintiff, that he could not assign any Breach of Covenants, but of necessity ought to answer to the special matter alleadged.

Debt for Flemish Money, but demanded by the name of 39.1. English.

**R** *Atell* versus *Draper*, Mich. 3. *Jacobi*. An Action of Debt brought for nine and thirty pounds, the Plaintiff declares that the first of *May*, primo *Iacobi*, sold to the Defendant twenty Northern Clothes for sixty pounds *Flemish* Money, to be paid upon Request, which sixty pounds *Flemish* Money amount to nine and thirty pounds *English* Money; and that the Defendant, though often requested, had not paid the nine and thirty pounds, to his Damages of, &c. The Defendant pleads *Nil debet per patriam*, and found for the Plaintiff, and moved in Arrest of Judgement, that the Plaintiff should have demanded the summ according to the Contract, which was for sixty pounds *Flemish*, and to have shewed, that it amounts to nine and thirty pounds *English*, but the whole Court against it; for the Debt ought to be demanded by a name known, and the Judges are not skilled in *Flemish* Money: and also when the Plaintiff hath his Judgement, he could not have his Execution by that name; for the Sheriff cannot tell how to levy the Money in *Flemish*; and also it is made good by the Verdict, for the Jury have found the Debt demanded, to wit, nine and thirty pounds. But if the Contract had been for so many Ounces of *Flemish* Money; or a Barr of Silver and Gold, now it cannot be demanded by the name of twenty pounds, or such a summ, which is not Coin, nor used in Trade or Merchandise, but in such Case must have a Writ of *Detinue*, and in that recover the thing, or the value; and so in the Book of Entries, fol. 157. is the President, where Debt was brought upon two severall Obligations, and demands eight and twenty pounds, and declares severally, that by one Obligation he owed eight and twenty pounds of *Flemish* Money, and 34 *H. 6. 12. & 9 E. 4. 46*. But note in that Case, the Plaintiff if he would might have declared in the *Detinet*, and it had been good.

If the Obligor marry the Obligee, the Bond gone.

**R**olles versus *Osborn*, Mich. 3. *Jac*. The Plaintiff brought an Action of Debt against the Defendant upon a Bond of a thousand pounds, and Serjeant *Nichols* moved the Court for the Defendant, and shewed that the Plaintiff and Defendant were obliged each to other in a thousand pounds a peice, that they should intermarry before such a Day, and both their Obligations were forfeited, and each of them sued the other; and the Defendant prayed that common Bail might be accepted of her, and she would accept of common Bail.



Bail of the Plaintiff; and the Court held it reasonable, but said, if they would marry, both their Bonds might be saved.

**B**arneshurst versus Yelverton, *Hill. 3. Jacobi.* The Plaintiff as Administrator of *I. S.* brought an Action of Debt against the Defendant, upon a Bond, and obtained a Judgement, and afterwards the Administration is revoked, yet notwithstanding the Plaintiff proceeded, and took the Defendant in Execution; and upon a Motion in the Court, the Court held the Execution void, and that the Defendant ought to be discharged, because it issued out erroneously; for the Letters of Administration being revoked, the power of the Plaintiff is gone, and determined, for he prosecuted the Suit in another's Right, and is but a Minister of the Ordinary; and then when the Ground of the Suit is over-thrown, to wit, his Commission, he hath no Authority to proceed further, and the Execution issued without Warrant. And the like Law upon a Judgement had upon an Administrator, the second Administrator shall not have Execution by it, for he hath no privity to the Record; which mark.

*Judgement obtained by an Administrator, and after Administration revoked, and party took in Execution, and delivered, because erroneous.*

**A**ndrews versus Robbins, *Trin. 4. Jacobi.* The Plaintiff brought Debt upon an Obligation made to him as Sheriff, with a Condition, that the Defendant should appear; and Crook said that the Defendant had pleaded his Appearance, and had omitted to say, as it appears by the Court, and it was held a grosse Fault, but the Record being perused, it appeared to be otherwise; for the Case was, that the Defendant was obliged to make an Obligation to appear in the Kings Bench at a day prefixed in the Writ and that the Defendant pleaded there was no day prefixed in the writ for his Appearance; and Crook moved that it was no Plea, for the Defendant was estopped, to which the Court agreed, that he was estopped, and Williams said, that if a man be bound to pay a hundred pounds, that *I. S.* owes to him, he cannot plead that *I. S.* doth not owe him a hundred pounds; and Tanfield said, if it were to pay all sums that *I. S.* owed him, he is concluded; & so it is held, 3 *Eliz. Dyer.* And the Court commanded Judgement to be entred for the Plaintiff, if no cause shewed to the contrary such a day.

*To plead an Appearance, and not say, Prout patet per Recordum, nung.*

**J**ackson versus Kirton, *Trin. 4. Jacobi.* In Common Pleas an Action of Debt brought upon an Obligation, the Condition was, that if *A.* would render himself to an Arrest in such a place, &c. The Defendant pleads, that by Privilege of Parliament, those of the Parliament, and their necessary Servants ought not to be arrested by the space of forty Days before the Parliament, nor sitting the Parliament, nor forty Days after; and sets forth that *A.* was a Servant to such a man of the Parliament at such a time, so that he could not ren-

*Nota.*

der himself to be arrested; to which the Plaintiff demurs; and the opinion of the Court was for the Plaintiff; for *A.* might render himself, and let it be at their perill, if they will arrest him.

*Award void  
for the incer-  
tainty, for be-  
ing the Judge-  
ment of one it  
ought to have  
plainness and  
certainty.*

**M***Arkham* versus *Jerux*, *Hill. 4. Jac.* Action of Debt brought upon a Bond, with a Condition to stand to the Award, Arbitrement, &c. of Master *Porley* of *Grays Inn*, about the Title of one Copy-hold Tenement, *M. P.* awarded, &c. that the Defendant should pay to the Plaintiff six pounds upon the 21 *May*, 3 *Jac.* at such a place, to wit, in the Church Porch of *C.* and further awards that the Plaintiff by his Deed should release to the Defendant his whole Right, &c. upon the said 21 Day of *May* at the same place upon the payment of the Money: and in another Clause of the Award he awarded that the Plaintiff should make further Assurance to the Defendant for the extinguishing of his Title, as should be advised, &c. And *Yelverton* moved that this Arbitrement was void, and is in a manner no Award, for it is repugnant and insensible; for although it be certain at what Day the Defendant should pay the six pounds, yet it doth not appear when, nor upon what Day the Plaintiff should release to the Defendant, for there is no such first Day of *May* in the whole Award, and it is not bound or tied to any year of the King, so that it is altogether uncertain; and although it may be collected that the Arbitrator did intend the 21. Day of *May*, because it is appointed to be made upon the payment of the six pounds, which was the 21. *May*, yet it is not expressed but onely by way of inference and implication: and it was objected, that admit the Award to be void in that part, yet it is good in the residue, which is to be performed by the Plaintiff, to wit, the making of better assurance; to which *Yelverton* answered, that all the Clauses in one Award are material, and the Clause of further assurance depends upon the repugnant Clause of the Release to be made; for the Award appoints that the Release is to be made upon the said first Day of *May*, whereas no such Day in the whole Award, shall be the first assurance; and the assurances which were to be made by the following Clause were in the intention of the Arbitrator, to be for the strengthening of the first Release, which was granted; and the Court said, there was much difference between Wills and Deeds, and between Arbitrements; for Deeds, &c. shall be construed according to the intent of the parties, and upon the words to be collected out of the Deeds; but an Award is of the nature of a Judgement, and Sentence in which ought to be plainness, and no collection of the intent and meaning of the Arbitrators; for how it ought to be his Judgement, and not the Judgement of another upon the words of the Arbitrator; and *Tanfield* said, it had been adjudged, that where the Arbitrator did award, that one of the parties should be-

come

*expressum propter  
non est in appellatione  
in award de multi-*

*tous plans in award  
sent matre:*

come bound to the other in the summ of, and no summ in certain, but a space left for the summ, that it was void : and if an Arbitrement be void in one Clause, although it be good in all Clauses, yet it is in Law no Award ; for a Judgement ought to be plain, certain, and perfect in all things : but if the Arbitrators award, that one of the parties, and 7. S. an Estranger shall do such a thing, that is good ; as to the party who is within the Submission, and void onely to 1. S. the Estranger, 19 E.4.

**A** *Tkins* versus *Gardiner*, Pasch. 5. Jac. The Plaintiff being President of the Colledge of Physicians in *London*, brought an Action of Debt against the Defendant, for practising Phisick upon the Charter made to them by H. 8. that none should practise Phisick in *London*, nor within seven Miles thereof, except such as were authorized by them, and gives them Authority to impole Fines upon such as shall practise Phisick, which Charter was confirmed by Act of Parliament in 14 H. 8. and he obtained Judgement upon the Statute, to recover a summ for himself, and the Colledge, and before Execution the President died, and whether the Successor should have Execution, and 8 E. 1. was cited, and divers other Books to that purpose.

*Judgement obtained by President of the Colledge of Physicians, his Successor after his Death, and not his Executor shall have Execution.*

**S** *tamford* versus *Cooks*, Pasch. 5. Jacobi. An Action of Debt brought Upon an Obligation, with a Condition, that the Defendant should seal such Assurances as should be devised by the Plaintiff, and that the Assurance should be of Copy-hold Land ; and the Plaintiff devised that the Defendant should seal a Letter of Attorney made to one to surrender the Copy-hold for him, and also seal one Bond for the injoying thereof ; and the Plaintiff offered these Writings to the Defendant to seal, and he refused, and upon such Refusal the Plaintiff brought his Action, and a Verdict was given for the Plaintiff ; and Serjeant *Yelverton* moved in Arrest of Judgement, that the Plaintiff ought not to have Judgement ; for he said, that the Defendant was not bound and compellable to seal that Obligation, because it was not in Law any Assurance, but a collateral thing ; and the whole Court agreed that ; and therefore being the Action was brought for refusing to seal the Obligation and Letter of Attorney, and the Judgement according it ought to be arrested : but *Cock* said, that Judgement ought not to be arrested, for the Premises of the Delaration, it appeared that he refused to seal the Letter of Attorney, and thereupon concluded, that it should not be arrested : and *Fenner* said, that the Letter of Attorney was not any such Assurance, as the Law required in such Case ; for when he had made the Surrender, it should be accounted the Surrender of him that made the Assurance, and he said, he should make a present Assurance of it : but *Tanfeild* was of another

*Assurance.*

ther opinion, and said, that when the Surrender was made, it shall be said to be the immediate Surrender of him that made the Letter of Attorney, and such an assurance as the Law required, and *Telverton*, Justice, said, the Letter of Attorney was lame for this cause, the Letter of Attorney was made to one, for the surrendering of such a Copy-hold, and did not say in the Letter of Attorney for him, and in his name, for otherwise, the Copy-hold might be the Copy-hold of him that surrendered by vertue of the Letter of Attorney, and then he should surrender his own Copy-hold; but *Tanfild* was of another opinion, because he said in the Letter of Attorney, that he did constitute and appoint, and in his stead and place put such a one, which words in his stead and place, are as full, as if he should have said, in his name.

**H**ollingworth versus Huntley, *Pasch. 5. Jacobi*, An Action of Debt brought upon an Obligation, the Condition, amongst many other things, contained that the Husband and Wife being Lessees for life of certain Lands, that if the said Husband and Wife should levy a Fine to an estranger, at the Costs and Charges of an estranger, and also that they should levy a Fine of other Lands, that they also held for their lives to an estranger, and at their Charge, then, &c. the Obliger sayes that the Husband and Wife did offer to levy the Fine, if the estranger, to whom the Fine was to be delivered would bear their Charges, the Obligee demurres, and it was adjudged for the Plaintiffe, because the levying the second Fine had not any reference to the other, because they are two distinct sentences, and these words, and also make them so.

*Tithe shall be paid of wood above twenty years growth, if it be not Timber.*

**M**an versus Somerton, *Pasch. 5. Jacobi*, The Plaintiffe being Parson of *Henley*, brought an action of Debt for six hundred pounds upon the Statute of *E. 6.* for not setting forth Tithe of Wood, and the Plaintiffe shews that the Defendant had cut down two hundred loads of Wood, to the value of two hundred pounds, and saith, the tenth part of that did amount to two hundred pounds, and so he brought his action for six hundred pounds upon the Statute, and the Plaintiffe was nonsuit, for one fault in his Declaration, for whereas he names the price of the Wood to be two hundred pounds, it was mistaken, for it should have been two thousand pounds, for he demanded more for the tenth part, then the principall is, by his own shewing, and *Tanfild* Justice held that Beech by the common Law is not Timber, and so it was adjudged in *Cary* and *Pagets* Case, and it was held, that Tithes shall not be paid for Beech above the growth of twenty years in a common Countrey for Wood, as in *Buckinghamshire*, for there it is reputed Timber, but in a plentiful Countrey, of



of Wood, it is otherwise, for there it is not Timber and Tithes shall be paid for such wood, *Silva cedua*, for which Tithes shall be paid, is under the growth of twenty years, but Tithes shall be paid for such wood which is not Timber, which is above the growth of twenty years.

**P**ercher versus Vaughan Trin. 5. Jac. An action of Debt brought upon an Obligation for six pounds thirteen shillings eight pence. The Defendant demands Oyer of the Obligation, and imparles, and after an imparlance the Defendant comes and sayes there was variance between the Plaintiffs writ, and the Obligation, for it appeared by the Obligation that the Defendant was obliged in *viginti nobilis*, and so his action ought to be brought according to the Obligation, and demands Judgement, if the Plaintiffe ought to have his action, the Plaintiffe demurres, and it was argued by the Plaintiffes counsell, first, that it was no variance, for it was said that twenty nobles, and six pounds thirteen shillings eight pence, were all one in substance, if a man be bound to pay a hundred nobles, and brings his action for fifty marks, it is not variance, 34 H. 8. 12. and 4 E. 3. Fitzherbert, Title *varians*, 102. agrees to that, but if a man be obliged to pay certain money in Flemish money, he ought to shew the performance of that strictly, 9 Ed. 4. 49. and the Plaintiffes counsell said that it was variance, it could not be shewed after an Imparlance in Marks Case, Co. 5. 74. and said the conclusion of the Defendants Plea to demand Judgement of the Plaintiffe, ought to have his action, was not good, for this Plea was not in barr of the action, but in abatement of the Writ, and Telverton, Justice, agreed to that, and he said when the Obligation was in *viginti nobilis*, it shall be intended twenty nobles, and good. Tanfeild said, that when there is no good and apt Latine words, for a thing, & no unapt Latine word is put in the Bond for that thing, the Bond is void, as when a man is bound in *quinque libris*, it it was adjudged in Mich. Term, 5 Jac. that the Obligation was void, because there was a fit Latine word, and that was *quinque*, and so it was adjudged in the Lord Danvers Case, where the Indictment for one blow *super capud*, and it was held void, because it was an unapt word, and there was a fit and apt word, to wit *Caput*, and Williams agreed to this, for he said it was adjudged in the common Pleas, between Pencrosse and Tont, a man was bound in a Bond in *viginti literis*, when it should have been *viginti libris*, and adjudged void for the same cause, but after in Hillary Term the Plaintiffe had Judgement, because in one Dictionary *nobilis* was a Latine word for six shillings eight pence.

Variance between the Obligation and count shall not be shewed after imparlance

Demand of  
Rent must be at  
the place of  
Payment.

**V**Entris versus Farmer, Trin. 5. Jacobi. A Lease was made for years, rendering Rent payable at a place of the Land : and the Court was moved, whether a Demand of the Rent may not be made upon the Land, but denied by the whole Court ; for they said, that the Demand must be made at the place of payment, although it be of the Land.

Judgement re-  
versed in an in-  
ferior Court for  
want of this  
word Dicit.

**F**ield versus Hunt, Mich. 5. Jacobi. Hunt in VVorcester Court obtained a Judgement after a Verdict in Debt upon a Contract, for twenty Sheep, and after it was removed by a Writ of Error into the Kings Bench, and generall Errors assigned : but upon opening the Errors, it was shewed the Court that there was no Declaration in VVorcester Court ; for the Declaration was thus, *Raphael Hunt* complains against *H. Field* of a Plea, that he render to him twenty pounds which he owes unto him, and unjustly detains, and whereof the same Plaintiff by *M.* his Attorney, whereas the said Defendant, &c. and by *Fennor, VVillams, and Cook*, it is no Declaration for Default of this word *Dicit*, and the sense is imperfect : and although *Yelverton* objected, that a Declaration is sufficient, if it be good, to a common intent ; and *Quer.* being writ short, it may be *Queritur*, and then it is, and whereof the same complaines ; but the Court held that would not help, for it is not certain to whom the word *Idem* should refer, whether to the Plaintiff or Defendant, and of the two it should rather refer to the Defendant which is the next Antecedent ; and the Court held it matter of substance which is wanting, and therefore naught ; but if it had been 4. and whereof the same *Raphael quer.* being writ short, it had been good ; for because the party Plaintiff is certainly named, and then *Quer.* could have no other sense then *Queritur*, and Judgement reversed, which mark.

Want of an  
Original after  
a Verdict no  
Error, but a  
vitious Original  
is Error.

**H**arrison versus Fulstow, Mich. 5. Jacobi. The Plaintiff brought an Action of Debt for fourscore and six pounds, in the Common Pleas, against *T. Harrison*, and the *Capias* was continued accordingly against *T. Harrison*, but the *Plur. capias* was against *William Harrison*, which was the very name of the Defendant, and that was but for fourscore and five pounds, which varied from the first Entry ; and *William Harrison* appeared upon the Exigent, and the Plaintiff declares against *William*, and he pleads, and they are at Issue by the name of *William*, and a Verdict for the Plaintiff, and Judgement accordingly against *William*, and upon a Writ of Error it was assigned for Error, that the Original did not maintain the Proceedings, for the Original is against *Tho.* and the Proceedings against *William* : and the Plaintiffs Counsel would have excused it, because the Judgement being against *William*, and the Original against *Tho.* as it is certified, it cannot

not be the Original against *William*, and so the Judgement against *William* being without Original it is aided by the Statute after a Verdict: but the Court held it to be Error; for there is great Difference between no Original and a naughty Original; for the want of an Original is helped, but not a vitious Original, and Judgement was reversed; for upon Diminution alleadged, that this Original was certified as the Original in that Suit, or else there was no *Obrulit* at all.

**L** *Otbbury* versus *Humsfey*, *Mich. 5. Jacobi*. *Lothbury* and his Wife Administratrix of *W. R.* brought an Action of Debt as Administrator upon an Obligation of forty Marks, dated 4. April, 38 Eliz. made by the Defendant to the Intestate, 1. the Defendant pleades that *Ridge* the Intestate. *October*, the first *Jacobi*. made his Will, and made the Defendant his Executor, and devised the Obligation, and the Money therein contained to one *H.* Son of the Defendant, and died, after whose Death the Defendant takes upon him the burthen of the Executorship, and administers divers Goods of *Ridges*, and that he is ready to aver this: to which Plea the Plaintiff demurs generally, and adjudged for the Plaintiff; for the Defendants Plea is not good without a Traverse, that *Ridge* died intestate. For the Action is brought as Administrator, and they count upon a dying intestate, and that being the ground of the Action ought to be traversed, as it is 9 *H. 6. 7.* Debt brought against one as Administrator of *J.* and counts that *J.* died intestate; the Defendant pleads that *J.* made his Will, and made him Executor, and held no Plea without a Traverse; and the same Law, 7 *H. 6. 13.* Debt brought against one *R.* Executor of *R.* the Defendant pleads that *R.* died intestate at such a place, and held no Plea; for if the Plaintiff maintain that *R.* made the Defendant Executor, and the other say, that *R.* died intestate at such a place, this makes no Issue, and therefore the Defendant ought to traverse that *R.* died intestate without that, that he made him Executor, and 4 *H. 7. 13.* the very Case in question is adjudged, that such a Plea in Barr is not good, without a Traverse, to wit, to say without that, that *R.* died intestate, according to the 3 *H. 7. 14.* and this was agreed by the whole Court without Argument.

*Plea naught  
for want of a  
Traverse.*

**C** *Heyney* versus *Sell*, *Mich. 5. Jac.* *Cheyney* as Executor of *Cheyney*, Nota. brought an Action of Debt upon an Obligation against *Sell*, & the case was, that the Testator had put himself as an Apprentice to *Sell* for seven years, and *Sell* bound himself to pay to his Apprentice, his Executors, or Assignes 10 *l.* at the time of the end or determination of his Apprentiship, the Apprentice serves six years, and then dies, and it was moved by *Towse* that the Money was due at the time of his Death, because then his Apprentiship ended, for he said, if a man make a Lease for one and twenty years to another, and oblige himself to pay

to the Lessee ten pounds at the end and expiration of his Term, and within those years the Lessor infeofes the Lessee, so the term expires, and the ten pounds should be paid instantly; but *Cook* denied that Case, because the Lessee hastened the end of his terme; but he said, that if a man lease Land to another for seven years, if the Lessee should so long live, and the Lessor oblige himself to pay ten pounds at the end of his terme, and he die within seven years, there he was of opinion, the Money was presently due upon his Death, but in the principal case, the whole Court held, the chief Justice being absent, that the Obligation was discharged, and that the Money should not be paid.

Plaintiff in  
Debt for Tithes  
need not be na-  
med Rector in  
the Plaint in  
the upper  
Bench.

**W**illot versus *Spencer*, Mich. 9. Jacobi. The Plaintiff brought an Action of Debt for Tithes of Wood upon the Statute of 2 E. 6. and *Forster* argued, that Judgement ought not to be given for the Plaintiff, because the Plaintiff did not shew in his Plaint that he was Parson; for he ought to bring his Action according to that name that he claimed the Tithes by, and this ought to be expressed in the *Queritur*, and therefore if a man bring his Action to recover any thing, as Heir, Executor, or Sheriff, he ought to name himself so in the *Queritur*, 30 H. 6. & 9 H. 4. but *Towse* said, the same Exception was taken between *Merrick* and *Peters*, and disallowed. *Fleming* Justice said, that if it had been by Writ he must have shewed it, but need not, it being by Plaint, if the truth appear in that, and if a man bring his Action as Assignee, he need not shew it in his Plaint, if the truth appear in the Declaration, but it is otherwise in an Original, and a Plaintiffe in Kings Bench, as an original, but not in all things, and if the Plaint be uncertain, the Defendant in that Court shall plead in Abatement of the Plaint, as to an Original in the Common Pleas; and at last two Presidents were shewen, one between *Champion* and *Hill*, and the other between *Merrick* and *Wright*, that were allowed without naming of the Plaintiff Rector in the *Queritur*, and Judgement was given for the Plaintiff by the whole Court.

Tithes cannot  
be leased with-  
out Deed.

Note, it was agreed by all the Court of Kings Bench, Mich. 5. Jac. and hath many times been ruled, that if a man sell his Tithes for years by word, it is good; but if the Parson agree that one shall have his Tithes for seven years by word, it is not good, by the opinion of *Fleming* Chief Justice, because it amounts to a Lease; and he held strongly, that Tithes cannot be leased for years without a Deed.

Judgement re-  
versed for Er-  
ror in the  
Judgement.

**C**ob versus *Hunt*, Hill. 5. Jac. Cob sued a Prohibition in the Common Pleas against *Hunt* Parson of D. in Kent, and suggests a *Modus demandi*, as to part of the Tithes demanded against him in the Spiritual Court, and as to the residue suggests a Contract, executed and performed between him and the Parson, in satisfaction of the residue.



residue, and because he proved not his Suggestion within six Moneths, *Hunt* the Parson had a Consultation, and Costs assessed by the Court to fifty shillings, and Damages fifty shillings by the Statute of the 2 E. 6. they shall be doubled, but in truth no Judgement was given to recover them, because these words, *Videlicet, Ideo considerat. fuit qd. recuperet*, was omitted: yet *Hunt* thinking that all was certain and perfect, brought an Action of Debt in the Common Pleas for the Costs, &c. and declared of all the matter above, and that the Damages were assessed, upon which it was adjudged, that he should recover, &c. and that the Costs were not paid, *Per quod Actio, &c.* And had a Judgement against *Cob*, by *Non sum informat.* and thereupon *Cob* brought his Writ of Error, as well in the Record and Proceffe, &c. of the Prohibition, as of the Record and Proceffe in the Action of Debt for the Costs, and assigne the general Error: but *Yelverton* assignes two Errors in special; first, that there was no Judgement in the Prohibition for Recovery of the Costs, but onely an Assessement of Costs without any more, which is not sufficient; for the Assessement of Costs onely is but matter of Office in Court, but no Judgement of Court to binde, which was confessed by the whole Court. The second Error was that no Costs ought to be assessed or adjudged in the Cause above, because the Prohibition is grounded solely upon the *Modus decimandi*, which needs proof, and upon the Contract between the parties, which requires no proof; and the Suggestion being intire, and part of it needing no proof, they could not give any Costs, for that is onely where the whole matter in the Suggestion needs proof; and therefore the mixing the Contract with the manner of Tithing priviledges the whole, as to the matter of Costs: but they might grant a Consultation, as to that part of the Suggestion which concerned the manner of Tithing, but not for the rest, which was granted by the whole Court, and so both the Judgements were reversed, which mark.

*If a Suggestion in part need proof, and part doth not, no Costs.*

**M***Arkham* versus *Mollineux*, Hill. 1. Jac. *Mollineux* sued out an Original in the Common Pleas in an Action of Debt upon a Bond against *Markham*, by the name of *John Markham*, Alderman de D. and all the mean Proceffe are continued against him by the name of Alderman *Markham* he appeared, and the Plaintiff declared against him by the name of *Markham* of D. Esquire, and afterwards the parties were at Issue, and it was found for the Plaintiff, and Judgement entred; and it was reversed by Writ of Error, because it did not appear that, that *Markham* was the same *Markham*, against whom the Original was prosecuted, and the Proceffe continued, but it seemed rather that he was another person by reason of his severall Additions of Alderman and Esquire, which mark.

*Judgement reversed for Error in changing the Defendants Additions.*

Action upon the Statute for Tithes, the Statute mistaken, yet it being according to divers Presidents ruled good.

**O**Liver versus Collins, Pasch. 6. Jacobi. The Plaintiff brought an Action of Debt upon the Statute, for not setting forth of Tithes, and shews that he is Parson of the Parish Church of *Little Lavar*, in *Com. Essex*, and that the Defendant had so many Acres within the Parish of *Little Lavar*, sowed with Wheat, whereof the tenth severed from the ninth part came to eight and twenty pounds, and shews that the Defendant at *Little Lavar* aforesaid took and carried away the Wheat without setting forth the Tithes, contrary to the Statute, by reason whereof he forfeited threescore Pounds, and upon *Nil debet* pleaded it was found for the Plaintiff, and moved in Arrest of Judgement; first, that the Statute was mis-recited, for whereas the Plaintiff declared, that the 4. *Novemb.* 2 *E.6.* it was enacted, it was said, that there was no such Statute; for the Parliament commenced 1 *E.6.* and continued by prorogation untill the 4. *Novemb.* 2 *E.6.* and therefore the Plaintiff was mistaken in that, but that Exception was not allowed, for there were an hundred Presidents against it; and in respect of the continual use in that form, as the Plaintiff had declared, the Court said, that they would not alter it, for that was to disturb all the Judgements that were ever given in that Court. And secondly, it was objected, that the matter was mis-tried, and there ought to be a new Triall, because the *Venire facias* was of *Parva Lavar*, whereas by their pretence it ought to have been of the Parish of *Little Lavar*, to which *Yelverton* made Answer, that the Triall was well enough, for by that Action no Tithe is demanded nor recovered, but the Defendant is onely punished for his Contempt against the Statute, in not setting forth his Tithe, and the wrong done to the Plaintiff complained of, is laid onely in the Village of *Little Lavar*, and not in the Parish; for all the places in the Declaration where the Parish is named, are onely matter of Conveyance and inducement to the Action, and not of the substance, for the substance is onely that where the wrong and grievance is done to the Plaintiff, and that arises onely in *Parva Lavar*, which was granted by the whole Court upon a grand Debate, at severall Dayes, and Judgement was given for the Plaintiff: and the like Judgement was given between *Barnard* and *Coſterdam* in an Action upon the same Statute, upon the last point for the Venn; and this hath been twice adjudged; but in *Coſterdams* Case which concerned the Earl of *Clanrickard*, with whom *Yelverton* was of Council, it was resolved, that if the Issue be upon the custome of Tithing, and that it be found against the Defendant, he shall pay the value expressed by the Plaintiff in his Declaration; for because by the collateral matter pleaded in Barr, the Declaration is in whole confessed.

Smith

**S***Mith* versus *Smith Trin. 6 Jacobi* one *Bisse* made *K.* his Wife, and *John* his Sonne, being one year old Executors and *K.* solely proved the Will, and afterwards married the Plaintiff, and they two brought an Action of Debt as Executors against the Defendant, and the Defendant pleads in abatement of the Bill, that *John* was made Executor with *K.* and is yet in life, and not named, the Plaintiffes reply, that *John* was but of the age of one year, and that *K.* proved the Will, and had Administration committed to her during the minority, and that *John* is, and was at the time of the Writ purchased within the age of seventeen years, and upon that *Yelverton* demurred, and adjudged for the Defendant that the Bill should abate, for both of them in truth were Executors, and ought to be named in the Action, and although by the Administration granted during the minority, *K.* had the full power, yet the Infant ought to be named, he being Executor.

*Bill abated for not naming an Infant Executor in the Affi-  
on, although Administration was granted during his minority.*

**G***omerfall* versus *Ask, Trin. 6. Jacobi*, The Defendant brought an Action of Debt against the Defendant as Administrator of her Husband, upon two former Judgements given in two Actions of Debt against the intestate, and shews the recoveries, the Defendant pleads that the intestate entred into a recognisance 35 *ℓ.* in Chancery to Sir *Henry Bechel*, and shows, that after the Judgements had by the Plaintiff, Sir *H.* obtained a Judgement against the intestate, upon the Recognisance, and that she hath not assets to satisfy the Plaintiff of the intestates Goods, beyond Goods that are chargeable and liable to the Judgement upon the Recognisance, to which Plea the Plaintiff demurres, and by *Fennor* and *Williams* justifies the Plea in Barr was good; for although the Plaintiffes Judgements mentioned in his Actions are before Sir *H.* Judgement, yet because the Plaintiff by his Action doth not demand Execution of the Judgements, but onely his Debt recovered, for this Action brought it as an originall, and in the same Court, as if he did demand the Debt upon the first Obligation, and therefore because the Plaintiff had not sued out a *Scire facias*, to execute the first Judgements, but had prosecuted, a new originall the Plea is good and allowable, as it had been upon the said Obligation, but *Yelverton* and *Fleming* were of a contrary opinion, for the Plea had not been good against the intestate himself, an i the Executor or Administrator represents his person, and therefore the Plea is not good, but onely in excuse of a *Devastavit*, and they were of opinion, that the Action brought by the Plaintiff, was in nature of a *Scire facias*, for he demanded the Debt in another course, then it was at first, for that Debt which was but matter of escript, is now become by the Judgement to be Debt upon Record, and of so high a nature, that the Judgement being in Force, he can never have an Action upon

upon the Obligation which is adjudged in *Higgins Case*, Co. 6 Rep. but *Cook* doubted, and the Plaintiff dying, the Court did not resolve.

Action upon  
the Statute 32  
H.8. of Arre-  
rages of Rents.

**A**pleton versus Baily Mich. 6. Jacobi. Apleton as Executor of Apleton brought an Action of Debt against Baily for the Arrerages of diverse Rents as well Copy-hold Rents, as Free-hold Rents pertaining to a Mannor, whereof the Testator was seised and thereof died seised, and the Rents were not paid to him in his life time, by reason whereof they belonged to the Plaintiff as Executor: And the Defendant though he was requested had not paid against the form of the Statute of the 32 H.8. And the Court, that the Action, did not ly for the Arrerages of Copy-hold Land, for the Statute of the 32 H.8. doth not extend to them, but only to Rents out of Free Land. Secondly, It lies not for the Rent of free Land, because the Plaintiff hath not shewed in his Declaration that the Defendant had attorned to the Testator in his life. And although in pleading it is good to allege a Feoffment of a Mannor, without pleading any Livery, or of any Attornment of Tenements, but when the Rent of any Free-hold Land comes in *Debate* it behoves both the Owner of the Mannor and his Executor that demands it, to convey the privy between the Tenant and the Lord which ought to be by attornment; for Rents and Services rest not without Attornment, which, mark.

Action lies not  
upon that Sta-  
tute for Arre-  
rages of Copy-  
hold Rents.

**P**eirson versus Ponnteis Mich. 6. Jacobi The Plaintiff as Executor of Peirson brought an Action of Debt against Jo. Ponnties of London Merchant, that he should render to him three and thirty pounds twelve shillings, in that the Defendant 5. Oct. 1598. at London, &c. By his Bill obligatory hath acknowledged himself to owe to the Testator, 1518. Florens, Polish, which then amounted to thirty three pounds twelve shillings to be paid to the Testator, *Ad solucionem festi purificat*, &c. Called *Candlemas* day next insuing, and to that payment had obliged himself by the same Bill: And the Plaintiff avers that, *Predicti soluciones dicti festi purificat*, &c. Next after the making the Bill were according to the use of Merchants the twentieth of February 1598. Yet the Defendant had not paid the 1518. Florence, Polish, or the thirty three pounds twelve s. to the Testator nor to the Plaintiff. The Defendant pleads, *Non est factum*, and found against him, and moved in arrest of Judgment; that the Declaration was not good, because first the payment of *Candlemas* is not known in our Law, but that was not allowed for that which is unknown in ordinary intendment is made manifest. and helped by the Averment in the declaration, because that payment among Merchants is known to be upon the twentieth of February, and the Judges ought to take notice of those things that are used amongst Merchants for the maintenance  
of



of traffick, and the rather, because the Defendant doth not deny it, but pleads *non factum*, by which he confesses the Declaration to be true in that averment. Secondly it was objected, that as the Case is, the use of Merchants is not materiall, because the Testator by any thing that appears, was not a Merchant, but it was not allowed, because the defendant that bound himself to pay, was a Merchant, and the Testator ought to take the Bill, as the defendant would make it, and he chose to make the payment according to the use of Merchants and not according to the Ordinary intercourse between party and party, which mark this by the whole Court.

**T**albot versus Godbold, Mich. 6. Jac. Godbold 28 Eliz. sealed a Bill to the Plaintiff made in this manner, *memorandum*, that I have received of Edw. Talbot, who was the Plaintiffs Testator, to the use of my Master, Mr. Serjeant Gaudy the sum of forty pounnds to be paid at Mich. following, the Plaintiffe brought an Action of Debt upon this Bill, and declared *verbatim* as the Bill was, and demanded the four pound, to which Declaration the Defendant demurred, and his pretence was as he supposed, because he had received the money but as a servant to anothers use, and so he ought not to be charged as a principall Debtor, for the Bill is but a Testimony of the Receipt, as is the 1 H. 6. and 2 H. 6. in account, for there an Indenture testifying the Receipt which under Seal did not alter the nature of the first account, but it was adjudged for the Plaintiff, for although the first part of the Bill witnessse the Receipt to be to anothers use, yet in the last clause of the Bill, for the payment of the money, he doth not say to be repaid by his Master, for then it would not charge him, but the clause is generall to be repaid, which of necessity ought to bind him that sealed, for otherwise the party shall loose his Debt, because he had no remedy against Serjeant Gaudy, and because the Debt appears to be due, it shall be intended to go onely in satisfaction of a due Debt which mark.

*Action of Debt brought upon a Bill, for money received to another use.*

**A**lexander, versus Lamb, Mich. 6 Jacobi, the Plaintiff brought an Action of Debt upon an Obligation of forty pounds against Lamb, as Executor, P. the Defendant pleads that P. in his life time was indebted to him in forty pounds due Debt, and that the goods of the Testator to the value of ten pounds came to the Defendants hands, which he retained towards satisfaction of his Debt, and averred that no more goods beyond the goods to the value of ten pounds came to his hands to be administred, the Plaintiffe replied and shewed that the Defendant is Executor in his own wrong to P. and that he hath many other goods of P. to be administred at S. in the County of Norfolk, and concludes, *& hoc paratum est verificare, &c.*

*An Executor of his own wrong cannot retain Goods in his hand to pay himself.*

the

the Defendant rejoyns, and demands judgement, if the Plaintiff shall be admitted to say that the Defendant is Executor of his own wrong, seeing by his Declaration he had affirmed him to be Executor of the Testament, the Plaintiff demurres in Law to this Plea, and as to the matter in Law, all the Court was for the Plaintiff, for he may well reply that the Defendant is Executor of his own wrong, notwithstanding the Declaration, for there is no other form of declaring as is adjudged in *Countes Case*, 5 Rep. fol 30. but the whole Court held the whole Plea to be discontinued, for the Defendant having pleaded as to the Goods to the value of ten pounds, which he retained in his hands for a Debt due to him, and that he had no other Goods, and concludes, *hoc paratum est definire*, which is not good, for he ought to have said, & *hoc petit quod inquiratur per patriam*, for there being a surplage of the Goods denied by the Defendant, and urged by the Plaintiff, it ought to come in issue, but could not by reason of the ill conclusion, but in the same Term between *West* the Plaintiff, and *Lane* Defendant, *West* demanded four pounds Debt against *Lane*, as Executor, as above, and all the rest of the Plea, is as above, and Judgement was given for the Plaintiff, because the Defendant had confessed Goods to the value of ten pounds in his hands, which was more then the Defendant demanded, and therefore although by Judgement of Law, an Executor of his own wrong cannot retain Goods to pay himself, and although the other proceedings in the Plea are naught, yet Judgement shall onely be given upon the confession of the Defendant, and so it was entered with Mark.

Primo deliberat, shall not be pleaded without a Traverse.

**G**reen versus Eden, Mich. 6 Jacobi, The Plaintiff brought an Action of Debt upon an Obligation for a hundred pounds, dated September the third, 1 Jac. the Condition was, that if the Defendant the fourth of September, anno 20 Jacobi, pay a hundred pounds to I.S. at such a place, and also save the Plaintiff harmlesse from any suit which should be brought against the Plaintiff, by reason of the Bond, in which he was bound to J.S. as Surety for the Defendant, then, &c. the Defendant pleaded, that true it was, that he by his Obligation bearing Date September the third 1 Jac. did become bound to the Plaintiff in two hundred pounds, but further said that the said Obligation was not delivered as the Defendants deed untill the seventeenth of September, in the second year of King James, and then it was first delivered, and further sayes that he had found the Plaintiff harmlesse, &c. to which plea, the Plaintiff demurres, and adjudged for the plaintiff, for the Bond mentioned in the Declaration is not answered, for the plaintiff indeed, shows that the Defendant was obliged to him by his Obligation, bearing date the same Day, &c. which is laid to be a perfect Bond, the same day as the Plaintiff counts, and

and then for the Defendant to come and say that it was first delivered the seventeenth of *September 20 Jacobi*, which is a year after, is no good Argument, but naught without taking a traverse, without that it was made the third of *September 10 Jacobi*. Secondly, as the Defendant hath pleaded, he hath made part of the Condition idle, and vain, for by the Condition it appears, that there is a Condition for the payment of a hundred pounds at a Day to come, to wit the fourth of *September*, in the second year, and now the Defendant by his Plea hath made the Day of payment, passed before he supposes the Bond to be delivered, within a manner takes away the effect of the Plaintiffs suit, and if the Condition had not stood upon two Branches, but upon one onely, and the Defendant will plead the Delivery after the Condition becomes impossible to be performed, then is the Obligation become single for the whole two hundred pounds, which mark, by the whole Court.

**B***Arret verlus Fletcher, Pasch. 7 Jacobi*, The Plaintiff brought an Action of Debt upon an Obligation of five hundred pounds, with a Condition to stand to the Award of *J.S.* and *J.D.* so that, &c. the Defendant pleads if the Arbitrator made no Award, the Plaintiff replies, and shews the Award made *verbatim*, and concludes that they had made an Award, and doth not assign any breach. The Defendant rejoyns, that the Award pleaded, is not the Deed of the Arbitrators, and Issue being joyned upon that, there was a Verdict for the Plaintiff, and *Yelverton* moved in arrest of Judgement, because the Plaintiff in his replication had not assigned any breach of the Award, and so had shewed no cause of Action, for the replication is not for any Debt, but is guided by the Condition, and is for the performance of a collaterall thing, to wit of an Award and although the Defendant had not answered anything to the breach, if it had been assigned, yet the Court ought to be satisfied that the Plaintiffe had good cause of Action to recover, otherwise they should not give Judgement, and although a Verdict is given for the Plaintiff, yet this imperfection in the Replication, is matter of substance, and is not helped by the Statute, by the opinion of the whole Court, except Justice *Williams*.

*If the Plaintiff assign no breach he shall never have a Judgement, though he hath a Verdict.*

**B***Arwick verlus Foster, Mich. 7 Jacobi*. Action of Debt brought for Rent, the cause was thus, the Plaintiff leased certain Lands to the Defendant, at *Mich. 1 Jacobi* for five years, yielding and paying Rent at our Lady Day, and *Mich.* yearly, or within ten dayes after, and for rent behind at the last *Mich.* the Plaintiff declares, as for Rent due at the Feast of Saint *Michael*, and *prima facie*, it seemed to the whole Court, but *Crook*, that the Action would not ly, but that

*Rent reserved at Michaelmas or within ten dayes after, due at Michaelmas.*

the Rent for the last quarter was gone, for it was not due at *Michaelmas*, as the Plaintiff had declared, for his own, shewing it is payable, and reserved at *Michaelmas*, or within ten dayes after, & although the Lessee might pay it at *Michaelmas* Day, yet it is not any Debt which lies in demand by any Action, untill the ten dayes be passed, and the reservation being the Lessors Act, it shall be taken most strongly against himself, and although the end of the Term is at *Michaelmas*, before the ten dayes, untill which time the Rent is not due, and because at that time the Term is ended, the Lessor shall loose his Rent; as if a Lessor die before *Michaelmas* Day, the Executor shall not have the Rent, but the Heir by descent, as incident to the Reversion, and if the Lessee should pay the Rent to the Lessor at *Michaelmas* day, and the Lessor should dye before the tenth Day, his Heir, being a Ward to the King, the King shall have it again, for of Right it ought not to be paid untill the tenth day, according to the 44 E. 3. but this Case being moved again in *Hillary* Term, *Fleming*, *Fennor* and *Telverton*, changed their opinion, and held that the Lessor should have the Rent, for it was reserved yearly, and the ten dayes shall be expounded to give liberty to the Lessee within the Term, for his ease to protract the payment, but because the ten dayes after the last *Michaelmas* are out of the Term, rather then the Lessor shall loose his Rent yearly, the Law rejects the last ten dayes.

A Judgement  
reversed by  
writ of error,  
notwithstanding  
a Verdict,  
and the Statute  
of 18 Eliz.

**M**olineux versus Molineux, *Hill. 7 Jacobi*. An Action of Debt brought against *Mo.* upon an Obligation, as Heir to his father, the Defendant pleads, that he hath nothing by descent, but twenty Acres in *D.* in such a County, the Plaintiff replies, that the Defendant had more Land by descent in *S.* to wit, so many Acres, and upon this they are at Issue, and found for the Defendant, that he had nothing by descent in *S.* by reason of which the Plaintiff could recover, and had his Judgement to have Execution of the twenty Acres in *D.* upon which Judgement in the Common Pleas, the Defendant brought his Writ of Error, and assigned for Error a discontinuance in the Record of the Plea, from *Easter* Term, to *Michaelmas* Term after, and whether this were helped by the Statute of 18 *Eliz.* because it was after a Verdict was the question, and adjudged to be out of the Statute, and that it was Error, for the Judgement was not grounded upon the Verdict, but onely upon the confession of the Defendant of Assets, and the Verdict was nothing to the purpose, but to make the Defendants confession more strong, and therefore the Statute of the 18 of *Eliz.* is to be intended, when the triall by Verdict is the means and cause of the Judgement, which mark, and therefore the Judgement was reversed, the Law seems to be the same, if the Plainiiff brings an Action of Debt for forty pounds, and declares for



for twenty pounds upon a Bill, and twenty pounds upon a *non tenet*, and the Defendant confesses the Action, as to the money borrowed, and they are at issue, as to the money demanded by the Bill, which Passes also for the Plaintiff, by reason wherof he hath Judgement to recover the forty pounds demanded, and the Damages assessed by the Jurors, and Costs intire, in which Case if there be a discontinuance upon the Roll, it seems that all shall be reversed, notwithstanding the verdict, for the verdict is not the onely cause of the Judgement, but the Confession also, and the Costs assessed intirely for both, but yet inquire of this.

It was adjudged by the whole Court, that in those Cases, where an Executor is Plaintiff, touching things concerning the Testament, and is non-suited, or the verdict passes against him, that he shall not pay Costs upon the new Statute of 4 Jac. for the Statute ought to have a reasonable intendment, and it cannot be presumed to be any fault in the Executor, who complains, because he cannot have perfect notice of what his Testator did, and so it was resolved also by all the Judges of the Common Pleas.

*Executor shall not pay Costs upon the statute of 4 Jacobi cap. 3.*

**G**oodier versus Jounce, Trin. 8 Jacobi. Jounce recovered in the Common Pleas a hundred and thirty pounds against Goodier, in *Craftino Animar.* 6 Jacobi, and the eight and twentieth of November the same Term, being the last Day of the Term, the Plaintiff proved an *Elegit* against Goodier, to the Sheriffs of London, where the Action was laid, and to the County Palatine of Lancaster, returnable, *Craftino Purificationis*, after; which was granted by the Court, and by the *Elegit*, to the County Palatine, it appeared, that it was grounded upon a *Testat.* returned by the Sheriffs of London, that Goodier had nothing in London, where in truth they never made such a Return, and upon that *Elegit* by a Jury impannelled before the Sheriff of Lancaster; a Lease of Tithes was extended for fifty nine years then to come, at the value of a hundred pounds, which the Sheriff delivered to J. the Plaintiff, as a Chattell of Goodiers, for a hundred pounds, and returned it, and that Goodier had no more Goods, &c. and thereupon Goodier brought a Writ of Error in the upper Bench, and assigned for Error, that no Return was made by the Sheriffs of London, nor filed in the common Pleas, as was supposed in the *Elegit*, and it was adjudged Error, for although the Plaintiff might have an *Elegit*, as he desired in the common Pleas, immediately both into London and Lancashire, but seeing he waived the benefit thereof, and grounded his Execution upon a *Testatum*, which was false, it was Error in the Execution, for as it appears, 18 H.6. 27. and 2 H.6. 9. that a *Testatum* is grounded upon a former Return filed, that the party had nothing in the County where the Action was brought, and

because it appeared upon Record, that the prayer of the *Elegits* was made the eight and twentieth of *November*, the last day of the Term, and by the *Testatum* it is supposed that the Sheriffs of *London* had returned *quindena Martini* which is before the eight and twentieth of *November*, that the Defendant had nothing in *London*, which seemed to be contrary to the Record, yet that is not material, but makes the matter more vicious, for it may well be, that since the Judgment was *Crastino animarum*, a *Testatum* might not issue out returnable *Quindena Martini*, and it shall be the Plaintiffs fault that he did not file it, and it shall be presumed to be such a Writ, as the Plaintiffs own Proccesse doth recite, and note that the whole Court did adjudge in this Case, that *Goodier* should be restored to the Term again, and although it was valued by the Jury, but at a hundred pounds, and delivered to *Jounce* the Plaintiff to hold as his own Goods and Chattells, yet *Goodier* shall have it again from *Jounce*, for he being the party himself, it is in Law but a bare delivery in *specie*, and therefore ought to be restored in *specie* again, and doth not absolutely alter the property, but attends upon the Execution to be good or naught, as the Execution is, and so it was adjudged before, in *Rebothams* Case, and also in *Woorrells* Case, as Mr. *Noy* said to *Telverton*, but it had been otherwise, if the sute had been to an estranger, by the Sheriff of the Term, for a hundred pounds according to the opinion of 28 *Eliz. Dy.* for it is the parties folly, that he doth not pay the Judgment, and if such sales should be made void none would buy Goods of the Sheriff, by reason whereof, many Executions would remain undone, and this by the opinion of the whole Court.

*S. Mith* versus *Newsam* and his Wife, *Mich. 6 Jacobi*. The Plaintiff, *Sas* Son and Heire of *Geo. S.* his father, brought an Action of Debt against the Defendant for twenty Marks, and declares that his father, *April* the twenty seventh, 25 *Eliz.* leased to the Defendant one house, &c. in *B.* in the County of *Bedford*, from *Michaelmas* next following, for one and twenty years, yeilding and paying during the Term, if the Father should so long live, thirty pounds at our Lady day, and *Michaelmas*, by equall portions, and yeilding and paying to the Heires and Assignes of the Father after his death twenty Marks, at the Termes aforesaid, by vertue whereof the Defendant entred, and occupied from *Michaelmas* 35 *Eliz.* &c. the Father dyed the fourth of *May* 7 *Jur.* at *B.* and because twenty Marks for a half years Rent were behinde, the Action was brought, the Defendant demurred to the Declaration, and adjudged against the Plaintiff, for the clause by which the Court is reserved to the Heirs, gives but twenty Marks for the whole year, and not twenty Marks every half

How a reservation for Rent shall be construed.

a year, and therefore the Plaintiff had mistaken his demand in suing for twenty Marks, for one half year, (for these words *ad Terminos prædictos*) are onely the time of payment of the twenty Marks which were to be paid as the thirty pounds were, and although in the clause that reserved the Rent to the Heirs, the words (by equall portions) were omitted, yet the Law will supply them, as it is in the 13 *H. 9. Avowry* 2.40. Rent granted to be taken at two Termes of the year, and they named it shall be intended by equall portions, although the Deed makes mention of that, for the reservation being the Act of the Lessor, shall be taken most strongly against him and his Heirs, and therefore shall have but twenty Marks for all the whole year, and no more, as in *Perkins* 22, two tenements in common make a Lease, rendering ten shillings, it shall be five shillings to each of them *March* 171. according to it the second cause of the Judgement was because the Plaintiff brought this Action as Heire to his Father, and doth not shew in his Declaration, that the Reversion descends to him, and the Rent demanded, is incident to the Reversion descended, and so the Plaintiff doth not make any Title to have the Rent, which mark, and Judgement was given, that the Plaintiff should take nothing by his Bill.

**N***Eale* versus *Sheffield* *Trin. 8. Jacobi rotulo. 782.* The Plaintiff brought an Action of Debt upon an obligation for fourteen pounds, the condition was that if the Defendant should pay seven pounds to the Plaintiff upon the birth-day of the Child of *John* living which God shall send after the Date of the Bond then, &c. The Defendant pleads, that the Plaintiff after the making of the Obligation and before the birth of any Infant of the said *J.* living to wit the 1. *September 7. Jacobi* was indebted to the Defendant in one load of Lime to be delivered upon request, and the same day it was agreed between them at *L.* that if the Defendant would discharge the Plaintiff of the said load of Lime, that then in consideration thereof, the Plaintiff would discharge the Defendant of the said Obligation, and would accept the said load of Lime, which the Plaintiff accepted in discharge of the Obligation, and did then acquit the Defendant of the said Obligation, and demands Judgement, to which Plea, the Plaintiff demurres, and adjudged for the Plaintiff for two causes, first because the Defendant had pleaded his Barr in discharge of the Obligation, whereas he should have pleaded it in discharge of the same contained in the Condition of the Obligation, for it is not a Debt simply by the Obligation, but the performance or breach of the Condition makes it to be a Debt, for the Obligation is proved by the Condition, so that if the Condition be not discharged the Obligation remains in his force and the matter in the Barr is not pleaded in discharge

*One must not plead in discharge of the Obligation, but of the Condition contained in the Obligation.*

charge

A contingent  
Debt cannot be  
discharged.

charge of the Condition, but of the Obligation, and therefore it is not good, which mark. Secondly, it appears that the Condition it self cannot be discharged; for the seven pounds is not due nor payable untill the Birth of the Childe of *John* living, which is a meer Contingency, and remote possibility, whether he shall ever have a Childe or no; and therefore it resting in Contingency, whether it will ever be a Debt or no, it cannot be discharged; for a possibility cannot be released, as it hath been adjudged in *Carters Case*, and it is not to be resembled to the Case where the Condition is to pay Money at a Day to come, for that may be discharged presently, for it is presently a Duty, although it be not demandable untill the Day; and therefore because it cannot be known whether the Day will ever come wherein *John* will have a Childe; and because it is no Debt nor Duty, therefore it cannot be discharged, by the opinion of the whole Court.

False Latine  
shall not over-  
throw an Obliga-  
tion.

**D**Odson versus Keyes, *Mich. 8. Jacobi*. The Plaintiff brought an Action of Debt upon an Obligation for ten pounds, and declares that the Defendant 23. *Octob.* 1608. at *M.* became bound to the Plaintiff in ten pounds to be paid upon request; the Defendant demands Oyer of the Obligation, which was entred in *hac verba*, *Nov-  
erint universi per presentes me Thomam Keyes tenerie & firmiter obli-  
garie Edm. Dodson, &c. Anno Regni Reginae Dom. nostri Jacobi, &c. Rege  
Defensor suis de Scotia sexto & Anglia quadragesimo secundo, 1608.* And upon this the Defendant demurred, and adjudged for the Plaintiff; for there are two principal things to be contained in one Obligation; first, the parties to whom: secondly, the summ in which one party is bound, and they are both here expressed sufficiently to the view of the Judges, for both the Obligor, and Obligee, are well named, and also the summ is well expressed to be ten pounds, but those words, by which it may be gathered, that the party intends to binde himself, are found in false Latine, *Videlicet, (tenerie & obligarie)* in which words there is onely an *e.* too much; and it is true, false Latine, as it is, 10 *H. 7.* shall abate a Writ, because the party may purchase a new Writ, but it shall not overthrow an Obligation; for the party cannot be again bound when he will: and although there is no such year of the Reign of the King, as of *Scotland*, the sixth, &c. it is not material, for it is good, though it have a false Date, as 13 *H. 7. Kelly*, and the party may surmise a Date in his Declaration, and it is good, and the Defendant must answer to the Bond, and not to the Date, and the Law is the same, if it have an impossible Date, as the 30. of *February*, whereas there is but eight and twenty Dayes in *February*, yet it is good: but in the principal Case it is helped by the Year of our Lord which is certain, and sufficient, and the Declaration



Declaration good, which had omitted the year of the King, and put in the year of our Lord, and Judgement was given by the opinion of the whole Court.

**H***Awes* versus *Leader*, *Hill. 8 Jacobi*. *Hawes* brought an Action of Debt against *Leader* Administrator of *Cookson*, the Case was *Thomas Cookson*, the nineteenth of *February*, 20 *Jacobi*, for twenty pounds paid into the Defendants hands by the Plaintiff, grants all his Goods mentioned in a *Scedule* annexed to the Deed, and gives possession of the goods by a *Platter*, and the goods remained in his house, as they were before, to be carried away upon demand by the Plaintiff, and covenants that the intestate, his Administrators, &c. should safely keep them, and quietly deliver them, and to perform that covenant, the intestate binds himself in forty pounds to the Plaintiff, and afterwards *Cookson* died, and the Plaintiff, the sixteenth of *March*, the sixth of *King James*, demanded the goods of the Defendant, being Administrator, and he would not deliver them, by reason whereof the Plaintiff brought his Action, and in his Declaration shews, in *specie*, what goods were contained in the *Scedule*, the Defendant pleads the Statute of the 13 *Eliz.* of fraudulent Deeds and gifts, &c. and further sayes that *Cookson* the intestate, the twelfth of *February*, 2 *Jacobi*, was indebted unto divers persons, and names them in severall summes, amounting to a hundred pounds, and being so indebted the nineteenth of *February*, 2 *Jacobi*, made the Deed of gift, as is above declared, being then of those and other goods possessed amounting to fourscore pounds and no more, and that it was made by fraud, and covin, between *Cookson* and the Plaintiff, to the intent to deceive his Creditors named, and shewes how that *Cookson*, notwithstanding the Deed of gift, occupied, and used the Goods all his life, and died, and that Administration was committed to the Defendant, the Plaintiff replies, that the Defendant had assets in his hands, to satisfy the Debts demanded, and further sayes that the Deed of gift was made upon good considerations, upon which they were at issue and at triall at *Huntington Assises*, *Cook* rejected the Triall, because the Issue was not well joyned, and a Replender ordered, upon which the Defendant pleaded as is above, and the Plaintiff demurred, and adjudged for the Plaintiff, first because the Defendant had not averred in his Barr, that the Debts due, yet certain, unpaid to the Creditors named, for there was four years time between the Deed of gift made, and the death of the intestate, in which time the Debts might well be presumed to be satisfied. Secondly, the Defendant did not shew that the Debts due to the supposed Creditors were by specialty, and then the matter of his Plea is not good, for the Defendant cannot plead such a Plea, but to excuse himself of a *Devastavit*,  
and

*A Deed of gift good against him that makes it, notwithstanding 13 Eliz. and against his Executors, and Administrators.*

and that could not be as this Case is, for he being Administrator is not chargeable with the Debts, if they be not upon Specialty. Thirdly, the Defendant supposed that it would be a *Devastavit* in him, if he should deliver the Goods to the Plaintiff which were contained in the Deed of Gift, but that cannot be, for those Goods in the hands of the Plaintiff are liable to the Creditors, as an Executor of his wrong, if the Deed of Gift be fraudulent. And fourthly, it may be the Creditors will never sue for their Debts, and by that means the Defendant will justify the Detainer of the Goods for ever, which would be very inconvenient. But if the Defendant had pleaded a Recovery by any of the Creditors; and that such Goods to the value, &c. had been taken in Execution this had been a good Plea. Fifthly, the Defendant is not such a person as is inabled by the Statute of 13 *Eliz.* to plead the Plea aforesaid, for the Statute makes the Deed void, as against the Creditors, but not against the party himself, his Executors, or Administrators, for against them it remains a good Deed of Gift, and this by the opinion of the whole Court.

Action brought upon an Obligation to stand to the Award of four, or two of them, Award made by two good.

*S*allows versus *Girling, Pasch. 9. Jacobi.* The Plaintiff brought an Action of Debt upon a Bond, and the Condition to stand to the Award of *A. B. C. & D.* of all Actions, Quarrels and Demands, &c. so that the said Arbitrement were made in writing, before such a Day by the said *A. B. C. & D.* or by any two of them under their hands, &c. The Defendant pleads that the said *A. B. C. & D.* nor any two of them made no Award: the Plaintiff replies, that *A.* and *B.* two of the Arbitrators, before the Day, by writing under their hands, &c. made an Award, and set forth the Award, and assigned a Breach in the Defendant for not paying of three pounds at a Day past limited by the Award, to which the Defendant demurs, and it was adjudged the Plaintiff; and the Question was, whether the Award made by *A.* and *B.* alone were good or no, because the Submission was to four named, and in the Premises of the Condition the Defendant is bound to stand to the Award of four also, yet it was adjudged by the Court upon consideration had upon every part of the Condition that the Award made by two alone is good; for the Arbitrators are made Judges by the assent and election of the Parties, and it appears that the parties put their trust not in the four jointly, but jointly and severally, and the *Ita quod, &c.* is an explanation of all the Condition that they four or any two of them might arbitrate all matters between them, and so much appears, 2 *R. 3. 18.* where two of one part, and one of another part put themselves to the Award of *I. S.* now by this Submission *I. S.* may arbitrate as well any matters between the two parties of one part, as between them, and the third because in the intent of the parties the end of their Submission was

to have peace and quietnesse : and 4 H. 4. 40. the Condition of a Recognizance was, that if *A. A.* shall stand and abide the Award of four, named three, or two of them, of all matters, &c. which is a division of their power ; and observe in the principal Case, that untill the *Ita quod*, comes the Condition is not perfect, for all the Condition is but one Sentence.

*Division*  
2 mrs in sentence

**B** *Risco* versus *King, Trin. 9. Jacobi.* The Plaintiff brought an Action of Debt upon a Bond for three hundred pounds, with a Condition, that the Defendant should perform all Covenants, Clauses, Payments, and Agreements, contained in one Deed poll of the same Date, made by the Defendant to the Plaintiff, the Defendant by way of Plea sets forth the Deed poll, *in hac verba*, in which Deed was contained one Grant and Bargain, and sale of certain Lands made by the Plaintiff to the Defendant for one hundred pounds paid, and two hundred pounds to be paid, in which Deed there was one Proviso, that if the Defendant should not pay for the Plaintiff to one *7. S.* forty pounds, to *7. D.* forty pounds, &c. at such a Day, that then the Bargain and Sale should be void : and the Defendant pleads that he had performed all the Covenants, &c. comprised in the Deed : the Plaintiff assigned a Breach for the not paying of forty pounds at the Day, according to the Proviso ; and the Defendant demurs, and adjudged for the Defendant by the whole Court ; for the Condition binds the Defendant to perform other Payments then such as the Defendant is bound by the Deed to perform, for the Obligation was made but for the strengthening of the Deed, and the Deed requires not any compulsory Payments to be made, but leaves it to the will of the Defendant, or to make the payments specified in the Proviso, or in Default thereof to forfeit the Land to the Plaintiff, and therefore it appears that it was not the intent and meaning of the parties to make an Obligation with a Condition repugnant to it, and contrary to the Deed poll of Bargain of Sale, and by this means the Payment of forty pounds to *7. S.* which is made voluntary by the Deed poll, shall be made compulsory by the Obligation : but the word (Payments) in the Condition of the Obligation shall have relation onely to such payments contained in the Deed poll which are compulsory to the Defendant, and not otherwise ; and because the neglect of the payment of forty pounds to *7. S.* assigned for the Breach is denied to be voluntary for the Defendant to pay or not, to which the Condition of the Obligation cannot in any reasonable construction extend, therefore it was adjudged against the Plaintiff.

*Debt.*

Judgement ar-  
rested for Nil  
showing in  
what Court the  
Deed was in-  
rolled.

**W**oolby versus Perlby, Mich. 9 Jacobi. An Action of Debt brought upon a Lease for years, the Plaintiff derives his Title by the grant of the Reversion, by way of bargain and Sale in Fee from the first Lessor, and declares that by an Indenture of such a Date, one grants bargains, and sells for money the Reversion to him in Fee, which Indenture was inrolled such a day, according to the form of the Statute, and because he shewed not in his Declaration in what Court it was inrolled, and the Statute of 27 H. 8. *Parles*, of many severall Courts, and that it is no reason to put the Lessee to such an infinite labour to search in all Courts, as well at *Westminster*, as in the Countrey with the Clerk of the Peace, and for this cause after a verdict, a *nil capiat per Billam* entred by the whole Court.

Judgement re-  
versed for  
want of these  
words, in a  
Tales at Assi-  
ses, nomina  
jurat, &c.

**S**IR George Savill, versus Candish Hill. 9 Jac. The old Countesse of *Shrewsbury*, had a Verdict against *Savel*, and upon a challenge of the Sheriff on the Plaintiffs part of the County of *Derby*, the Tenure was directed to the Coroners, who returned all the Writs, and at the Assises, a *Tales* was awarded, and the name of one of them of the *Tales* was *Gregory Grigson*, &c. and by *postea* returned by the Clerks of the Assise in the Common Pleas, the *Tales* was returned to be by the Sheriff, but in the entring up the Judgement it was made by the Coroners, and the name of the man of the *Tales*, by the Clerk of the Assise, was restored according to his right name *Gregory*, but entred in the Roll, by the name of *George*, and upon that Judgement *Savill* brought a Writ of Error, which depended ten years and more, and the first Plaintiff, who was the Countesse of *Shrewsbury* died, this matter being indiscussed, and *Candish* as Executor to the Countesse, revived all by *Scire facias* why he should not have Execution, and after many debates, the Judgement was reversed for three causes: first because upon the Pannell of the Jurors names, after the twenty four Jurors were named, at the foot of the Pannell, two names were added to the Jurors, which in truth were the men of the *Tales*, but no mention was made that they were the names of the Jurors, impannelled, *de novo*, according to the form of the Statute, which ought to be, for at the Common Law the Justices of assise cannot grant any *Tales*, to supply the default of the first Jurors, but it is given only by the Statute of the 35. H. 8. which ordains that their names shall be added to the first Pannell, and this cannot be discerned to be done accordingly, if such a stile and Title be not made over their names *viz. nomina jurator. de noto apposit. secundum formam Statuti*, to distinguish what is done by the Common-Law, and what by the aid of the Statute, and also the Coroners names ought to be added to the *Tales*, at the bottom of the Pannell, and in this Case, their names were onely indorsed, which was upon the



the Return of the first Pannell, and although divers Presidents were shown to the Court, wherein the names of the Jurors *de novo apposit.* &c. were united upon the Pannell, yet the Court did not regard them, because it seemed that they passed in silence without debate had upon them, the second cause was because it appeared by the Return of the *possea*, that the *Tales* were returned by the Sheriff, which is error in the first Proccesse to the Coroners, and although in the Entry in the Common Pleas of the Judgement, it is made to be by the Coroners, yet it is not helped in this Case, for the warrant of the Roll is the Clerk of the Assises Certificate, and thus is that, the *Tales* was returned by the Sheriff, and the Court cannot intend it to be otherwise then is certified, and thirdly the name of the Juror in the *Tales*, which is, *Gregory* is made in the Entry of the Judgement to be *George*, and although the will shall be amended in this point according to the Certificate of the *possea*, then in the other point of the Return of the *Tales* by the Sheriff, it is not amendable, and so it is error every way, and the Judgement was reversed by the whole Court.

**B***Ridges*, versus *Enion Hillar*. 9 Jac. The Plaintiff declares, how that he and the Defendant, *February tenth Anno 7.* submitted themselves to the Award of *S.R. Bodenham*, who awarded they should be friends, and that the Defendant should pay the Plaintiff ten pounds at *Midsummer* following, at such a place, and the ten pounds being unpaid, the Plaintiff brought his Action, the Defendant pleads in Barr a release made by the Plaintiff to him, of all demands which was made, the tenth of *April*, before *Midsummer*, when the Debt was to be paid, and the release was of all demands, from the beginning of the world, untill the tenth of *April*, and shows the Release to the Court, to which the Plaintiff demurres and adjudged against the Plaintiff, for although the sum of Money awarded is not grounded upon any precedent Debt or contract between the parties, yet by the opinion of the Court it lies in demand presently, and the Plaintiff might assign it by his will, and the Executor should have it, and by the spirituall Law, Administration may be granted of it, before the day of payment, if the Plaintiff dye before, yet it is not recoverable before *Midsummer*, nor will any Action ly for it, but it is a duty presently by the Award, and as the award is perfect presently as soon as it is pronounced, so are all the things contained in the Award, if they be not made payable upon a condition precedent on the part of one of the Parties, as if an award be made, that if the Plaintiff shall give to the Defendant at *Midsummer* one load of Hay, that then upon the Delivery of the Hay, the Defendant should pay the Plaintiff ten pounds, in this case the ten pounds cannot be released

By a Release of all demands money to be paid at a day to come, may be released before the day.

before the Day, for it rests meerly in a possibility and contingency, for it becomes a Duty upon the Delivery of the Hay onely, and not before; and therefore it is like the Case, 5 E.4.42. of a *Nomine pene* waiting upon the Rent, which cannot be released untill the Rent be behinde, for the not paying the Rent makes the *Nomine pene* a Duty; and the Case in question is like the Case, *Littleton* 117. where a man is bound to pay Money at a Day to come, for a Release of Actions before the Day cuts off the Duty, because by 7 H.7.6. it is a Duty presently, and the Case is stronger here, because the Release is of all Demands; which observe.

If the Defendant confess he hath Assets, the Sheriff may return a *De-vastavit*.

**M***organ versus Sock, Pasch. 10. Jacobi.* *Sock* brought an Action of Debt upon an Obligation of fourteen pounds entred into by *Ar. Morgan*, Anno 1. Jac. against *Tho. Morgan* his Administrator; the Defendant pleads that after the Death of *Arth.* and after Administration was to him committed, to wit, the 16. of September, Ann. 6. the Plaintiff brought his Original against him, of which he had no notice untill the 24. of February Ann. 6. before which Day the Defendant was upon the *Exig.* for not appearing, which *Exig.* was returnable *Tres Pasch.* after, and that the 17. of Febr. which was before the notice, his Letters of Administration were revoked by the Archbishop, and granted to *Rich. M.* the Brother of *Arth.* which *Rich.* is now Administrator, and that he at the time of revoking the Administration had divers Goods of the Intestates in his hands, and shews them what they were, to the value of two hundred pounds, and that he after the Administration revoked, and before notice of the Suit, had delivered them over to *Rich.* to wit, the 22. of February, 6. Jacobi, and that he at the time of the Administration revoked, had fully administred all the Goods of the Intestates, besides the Goods delivered to *Rich. &c.* The Plaintiff replied, that the Administration was revoked by Covin between the Defendant and *Rich.* and upon that they are at Issue, and the Jury found it to be Covin, by reason whereof the Plaintiff had a Judgement to recover the Debt and Damages of the Goods and Chattels of the said *Arth.* at the time of his Death, being in his hands, to be levied, and upon that Judgement he brought a Writ of Error, and assigned for Error, that the Judgement ought to be conditional, to wit, to recover the Debt of the Goods of the Intestate, if so much remain in his hands, and not absolutely. But the Judgement was affirmed by the whole Court; for where the Judgement may be final and certain, there it shall never be conditional. And because it appears by the Defendants Plea, that he had two hundred pounds in his hands of the Intestates Goods, it would be in vain to give Judgement against him, if he had so much in his hands, seeing he himself hath confessed by his Plea, that

that he had more in his hands then would satisfie that Debt ; and if the Sheriff could not levy the Debt in the Defendants hands, he may upon the Defendants own shewing, without any Damage return a *Devasavit*, and this by the opinion of the whole Court, and then there was shewed to the Court a President in the Common Pleas to that purpose.]

**D***Onghty* versus *Fawn*, *Mich. 11. Jacobi*. The Plaintiff declares Upon an Obligation of an hundred and twenty pounds, dated 2. *Novemb. 43. Eliz.* And the Condition was, that one *Edm. Asple* by his last Will in writing of such a Date, had disposed the Wardship of the Defendant, whereof the Defendant was possessed, &c. if therefore the Defendant do save and keep harmlesse the Plaintiff, &c. from all Charges, and Troubles, &c. which may happen to the Plaintiff, &c. for or by reason of the last Will of the said *Ed. A.* or from any thing mentioned in that, touching or concerning one *M. Fawn*, or any Legacy or Bequest to her given or bequeathed, or otherwise from *Ed. A.* to her due, then the Obligation, &c. The Defendant pleads that the Plaintiff was not damaged. The Plaintiff replies, that after the Obligation made, one *M. Smith* in the behalf of *Jo. and Ed. A.* Sons of the said *Ed. A.* named in the Condition, did exhibite a Bill against the Plaintiff, as Administrator of *A.* in the Chancery, for the payment of the Portions of the said Sons, to which Bill the Plaintiff by way of Answer pleaded fully administr'd, and for the making good thereof, sets forth divers payments by him made, and amongst other payments shews that he had payed to *M. Fawn*, named in the Condition, sixty pounds for a Legacy due by the Will of the said *Ed. A.* the payment of which sixty pounds was disallowed by that Court, and by the Order of the Chancery, sixty five pounds paid, for not allowing the first sixty pounds to *Ed. A.* the Son, which sixty and five pounds the Defendant had not repaid, though thereunto requested, and so he was damaged; to which Replication the Defendant demurs; and the opinion of the whole Court after a great Debate, was against the Plaintiff, for the Plaintiff in his Replication had alleadged two Causes to inforce his Damage; the first was, that the Plaintiff in his Answer in the Chancery had alleadged the payment of sixty pounds to *M. F.* for a Legacy due to her by the Will, and that such Allegation was rejected by the Court, of Chancery, and neither of those matters are certainly alleadged, but by way of Implication, and not expressly; for he ought to have shewn that a Legacy of sixty pounds was given to *M. F.* by the Will of *E. A.* for although the Will of *E. A.* is recited in the Condition in the Date, against which Recitall the Defendant may not be admitted to say, that he made no such Will, yet the Legacy given to *M. F.* is not recited

recited in the Condition, if not in the General, against which the Defendant may take a Traverse, that *Edm. A.* did not bequeath such a Legacy of sixty pounds, and upon that a good Issue may be taken. And secondly, the Plaintiff sayes, that the payment of the said sixty pounds was disallowed by the Court of Chancery, and doth not appear in the Replication where the Chancery was at that time, to wit, whether at *Westminster*, or at any other place, and it is issuable and triable by a Jury, whether any such Order of Chancery were made or not, for the Orders there are but in Paper, and are not upon Record to be tried by Record, but by a Jury: and the Plaintiff perceiving the opinion of the Court against him, prayed that he might discontinue his Suit, which was granted by the whole Court; but *Quere* of this, it being after a Demurrer.

Action of Debt brought against the Sheriff upon an Escape, for one taken upon a *Capias* upon a Recognisance, and adjudged that it would not lie.

**W**eaver versus Clifford, Pasch. 44. Eliz. rotulo 453. The Plaintiff brought an Action of Debt upon an Escape against Clifford, and declares that one *A.* was bound to the Plaintiff in one Recognisance of a hundred pounds to be paid at a Day, at which Day *A.* made Default of Payment, and the Plaintiff sued out two *Scire fac.* and upon the second *Scire fac.* a *Nihil* was returned, and the Plaintiff had Judgement to recover; and afterwards he sued out a *Levari fac.* and a *Nihil* being returned, the Plaintiff prosecuted a *Capias ad satisfaciend.* by vertue of which Writ the Defendant being then Sheriff took the said *A.* and afterwards at *D.* in the County of *S.* permitted him to go at large; to which the Declaration the Defendant demurred. *Dampert* for the Defendant, and he shewed the cause of the Demurrer to be because a *Capias* upon the Recognisance did not lie; and he divided the Case into two parts, first whether a *Capias* would lie in the Case; and secondly, whether the Sheriff would take the Advantage of such a naughty Procelle; and as to the first it seemed to him that a *Capias* would not lie, because it appeared by *Herberts 5. Repub. fol. 12.* And *Garmons Case 5. Rep. fol. 88.* that the Body of the Defendant was not liable to Execution for Debt, by the Common Law, but onely in Trespasse, where a Fine was due to the King, or that he was accountant to the King: and the Plaintiff could have no other Procelle but a *Fieri facias* within the year, and if the year were passed, then he might have a new Original in Debt. But now by the Statute of *Marlbrig. cap. 23.* And *Westm. 2. cap. 11.* a *Capias* is given in Account, and by the 25 *E. 3. c. 17.* *Capias* is given in Debt and Detinue, and by the 19 *H. 7. c. 9.* the like Procelle is given in Case, as in Debt and Trespasse, and the 23 *H. 8. c. 14.* a *Capias* is given in a Writ of Annuity and Covenant, but Statute gives a *Capias* in this Case, and therefore it remaines as it was at Common, and by that it would not lie, which is also apparent by the Recognisance, for that



that is, that if the Debt shall be levied of the Goods and Chattels, Lands and Tenements, &c. and doth not meddle with the Body, and by an expresse Authority, 13 & 14 *Eliz. Dier*, 306. *Puttenham's Case* it is held that the Chancery hath no Authority to commit the Defendant to the *Fleet*, upon a Recovery in a *Scire facias*, upon a Recognisance, because the Body is not liable. And for the second point, it seemed to him, that the Sheriff should take Advantage of this, which should be as void and as null, whereof a stranger may take benefit, and to prove this he took this Difference, when a Proceſſe will not lie, and where it is disorderly awarded, as if an *Exigent* be sued out before a *Capias*, or an Execution before Judgement; for if that Proceſſe be originally supposed, there the Proceſſe is but erroneous, in *Drurries Case*, 8. *Rep.* 142. 34 *H. 6. 2. b.* But if the Action it self will not maintain the Proceſſe as a *Capias in Formedon*, there that Proceſſe is as void and null: and he took another Diversity, when the *Capias* is taken by the Award of the Court, when Judgement is given that he shall recover; for in that Case it shall remain good, untill it be reversed, because it is the Act of the Court; and so is *Drurries Case* to be intended: but if the party himself take it, it is at his own peril, as here it is; for the Plaintiff hath onely pleaded, that he prosecuted, &c. which is as void to the party who sued it out, and he shall have no benefit of it; but the Sheriff shall not be punished for false Imprisonment, because he is not to examine the illegality or validity of the Proceſſe; for the 11 *H. 4. 36.* If a *Capias* issue out without any Original: and the party be taken, the Sheriff shall not be punished; and for these Reasons he prayed Judgement for the Defendant: *Noy* was for the Plaintiff, and he agreed, that at the Common Law no Action did lie in this Case, as it hath been said; but he was of opinion, that this Case is within 25 *E. 3. cap. 17.* for the intention and drift of the Statute was to give speedy remedy to recover Debts, and the Action is all one in the eye of the Law, as if it had been done by Original, which in the equity of the Statute. And a *Capias* lies upon a Recognisance against a Surety for the Peace, and upon a *Scire facias* against the Bail in the Upper Bench. As to *Puttenham's Case*, the Reason, because he was not in Execution before. And for the second Objection, although the *Capias* did not lie, yet it is but Error; for if the Court had Jurisdiction to hold plea of the Cause, although the Proceſſe be naughtily awarded, it is but Error, of which the Sheriff shall not take benefit; and therefore if a Woman have recovered in Dower, and hath Damages in the Common Pleas, and thereupon the party takes a *Capias* for the Damages, and the party be taken, and suffered to go at large, it is an Escape, 10 *Hen. 7. 23.* and if a *Capias* be awarded in the Common Pleas, after the Record removed, it is but

but Error, and so ruled, 13 E. 3. Title Barr, 253. But if the Court hath no Jurisdiction in the cause, as a *Formedon* brought in the upper Bench, as it is 1 R. 3. 4. or an Appeal in the Common Pleas, or where a Writ is awarded out of the Chancery, returnable in *Chester*, these are void, and *coram non iudice*, and there ought not to be any arrest upon such a Writ, and he cited a Case, *Trin.* 31. and 37. *Eliz.* in the Exchequer, *Woodhouse* and *Ognells* Case, ruled accordingly, and as concerning the difference taken, there is no other form of pleading, but only, *quod prosecutus fuit quoddam, &c.* without saying, that it was by the award of the Court, and the Court at that time did strongly incline, that it was but Error at the most, but *Mich.* 11 7a. It was adjudged by the whole Court, that the *Capias* could not ly, and that it was onely Error, of which the Sheriffe shall not take the benefit.

Debt brought  
upon a Lease  
made to an In-  
fant.

**K**etleys Case, *Pasch.* 11 7ac. An Action of Debt brought for arrears of Rent, brought against *R.* upon a Lease for years, the Defend. pleads in Barr, that the time of the Lease made, he was within age, to which the Plaintiff demurres, and upon the first reading of the Record, the question was whether a Lease made to an Infant be void, and it was said it should be void, otherwise, it might be very prejudiciall to Infants, whom the Law intends not to be of sufficient discretion, for the manning of Land, and also the Rent may be greater then the value of the Land, to the great impoverishing of the Infant, and took this difference, where it is for the apparant benefit of the Infant, as a Lease made by an Infant rendring Rent, and the like, and when it is but an implied benefit, as here, for the Law intends that every Lease is made for the benefit of the Lessee, although *prima facie*, it seems to be but tail and trouble, but the Court held it onely voidable, as Election, for if it be to the Infants benefit, be that benefit apparant or implied, it shall be void in no Case, *prima facie*, as 21 H. 6. 31. b. but the Infant may at his Election make it void, for he shall before the Rent day come, refuse, and waive the Land, an Action of Debt will not ly against him, for otherwise, such a Lease shall be more strong then any Fine or Record, and great mischief would insue, and as to the prejudice, it well be answered, for if more Rent be reserved, then the value of the Land, he ought to have set it forth, that it might have appeared to the Court, which is not done, for then clearly he should not have been bound, for there had been no profit to the Infant, as *Russells* Case is, 5 Rep. 27. for if an Infant release, it is not good, except he hath received the money, and it also appears by 21 H. 6. that if he did not enter and manure the Land, that an Action of Debt would not ly against him, but the principall Case was without colour, for the Rent, and taking the profits were Land, as  
one

one day of the Reservation, and secondly it was not shewed, that the Rent was of greater value, and thirdly, the Defendant was of full age, before the Rent day came.

**H**iggins Case, Pasch. 11 Jac. Action of Debt brought by Higgins against Yelverton, was of an opinion at the Barr, that if one be arrested, upon a Proceſſe in that Court, and he puts in Bail, and afterwards the Plaintiff recovers, that he might, at his Election take out his Execution either against the principall, or Bail, but if he took the Bail, or arrested him, or had him in Execution for the Debt, although he had not full satisfaction, he could not meddle with the Plaintiff, but if two be Bail, although one bee in Execution yet he may take the other also, and Coderidge, Justice, was of the same opinion, and Man the secondary, said it was the daily practice there, and so if the principall be in Execution, he cannot take the Bail.

One may take his Execution either against the principall or Bail at Election.

**H**aukinson versus Sandilands, 11 Jacobi. The Plaintiff brought an Action of Debt upon an Obligation for forty pounds against the Defendant, who demanded Oyer of the Condition, and afterwards pleads that the Obligation was made and delivered by him, and one M. who is still living at D, and demands Judgement of the Writ, to which the Plaintiff demurres the words of the Obligation, were *Noverint universi, &c. ad quam solutionem bene & fideliter faciend. Obligamus nos vel quemlibet nostrum*. And whether this was, should be accounted a Writ, Obligation, or Severall, at the Election of the Plaintiffe, was the question, and Ger. Cook was of opinion, that it should be brought against both, and his onely reason was, that at most the Plaintiffe had but an Election, for the word (*vel*) could not be taken for (*et*) as it is 11 H. 7. 13. a Grant made to J. S. at J. D. is void, and 20 H. 6. grant to two, to them, or to the Heires of one of them, is not good, and then if he had onely an Election, he hath made that already, for the Defendant hath pleaded and averred, that is, was made by two, joyntly by the appearance, whereof he hath agreed to take it accordingly, but Yelverton argued in this manner, that although the words in an Obligation be not proper and apt, yet if they be substantiall, it is enough, and therefore 28 H. 8. 19. *utrumque nostrum* is adjudged good, and the 21 R. 2. 939. *ad quam quidem solutionem obligamus nos, & singulos nostrum*, is adjudged severall and joint and for a direct authority he cited 7 H. 4. 66. where an Obligation was, *nos, vel alterum nostrum*, and the Plaintiff brought severall *Precipes*, and adjudged good, that he might make it severall or joynt, and all the Judges were clearly of an opinion, that the Action was well brought, for as it hath been said,

An Action of Debt brought upon a Bond, which was, Obligamus nos, vel quemlibet nostrum, adjudged to be joint and severall at the Plaintiff's Election.

the Plaintiff had his Election, and that Election would be said to be executed by the joynt Delivery, for there was no cause to make Election untill the Bond was perfected, and therefore though one delivers it at one time, and the other at another, yet the Plaintiff may have a *caput Precipe*, if he will, for the Election is in bringing the Action, and the words, (*vel*) and (*&c*) are but Synonimæ, and *Champions Case*, *Plowden* 286. (*&c*) is taken for (*vel*) and the 21 E.3.29. in *Mallories Case*, (*u*) is taken for (*and*) therefore they gave Judgment that the Defendant should answer over.

Action of Debt upon an Obligation to perform an award, and the breach assigned for exhibiting a chancery Bill, and adjudged no Breach.

**F**reeman versus Shield, *Trip.* 11 Jacobi, and adjudged Pasch. 12 Jacobi. Freeman brought an Action of Debt upon an Obligation against Shield, and proved Oyer of the Condition, which was that, if the Defendant should stand to the Award, and Arbitrement of J. S. that then, &c. the Defendant pleads that the Arbitrators, awarded, that whereas there was no suit in the Chancery, depending against the Plaintiff for divers matters, that the Plaintiff should be acquitted of that suit, and of all the matters contained in the same Bill, and the Defendant further alledges, that he did not make any prosecution of the said Bill, but that the Plaintiff stands acquitted thereof, the Plaintiff replies that the Defendant after the said Award such a year and day, did exhibit a new Bill which did contain the same matter which the first Bill had, and set forth at large, both the Bills, by which it appeared to the Court that it was so, to which Plea the Defendant Demurres, and the cause of the Demurrer onely was, because the Plaintiff had pleaded, that the Defendant had exhibited a new Bill, but had not alledged any Proceffe taken forth upon the same Bill, and if this be a breach of the award is the question, *Govin* was for the Plaintiff, and he was of opinion, that it was a breach for the words were *quod stare acquietatus*, and to be acquitted is not onely to be intended of an actuall disturbance or molestation, but if the party be put in fright, or is liable to any Proceffe, it is a breach, 8 Ed. 4.27. a Condition to save one harmlesse, if a *Capias* be awarded against him, although it be not executed, yet it is a forfeiture of the Bond, nay, though it was never delivered to the Sheriff, for otherwise the Plaintiff should be in continuall care & trouble, for fear lest the Defendant should do it, and so the Defendant may dally with him a long time, which shal be mischievous, & therefore it may be resembled to 9 H. 7. where if a man sell a thing with warranty to pay for it at a day to come, if the thing sold be corrupt, the party may have his Action of deceit, before the day of payment, because it is in the others power to bring his Action, and so it is in the Defendants power to serve the Plaintiff with Proceffe when he pleases, and therefore it is a breach, *Coventry* for the Defendant; first because,



## Actions of Debt.

because it is no such Process as can prejudice, for neither goods nor Body shall be taken, and therefore is not like the Cases before cited. And secondly, it is not such a process as our law respects or regards, for a Bill is but as a Petition: *Haughton* Justice was of the same opinion with the rest of the Judges, but adjourned untill *Hill. 11. Jac.* and an Exception taken, because the Defendant had not answered the Declaration, for the Condition is that he should be acquitted, & the Defendant pleaded that he hath been acquitted; and *Cook* was of opinion that it was good, and *Pasch. 12. Jac.* Judgement was given for the Defendant by the whole Court.

**K***ipping* versus *Swain*, *Trin. 11. Jacobi.* The Plaintiff brought an Action of Debt against *Swain*, upon the Statute of 2 E. 6. for not setting forth of Tithes, and declares, whereas the Plaintiff being Proprietor of the Rectory of *B.* in the County of, &c. for the term of seven years, and that the Defendant was Occupier of Lands within the same Parish for six moneths by a Devise made the tenth of *March, Anno decimo Jacobi.* And that the Defendant 27. *Aug.* the year aforesaid did cut his Corn there growing; and that the tenth of *September* then next following the Defendant being (*Subdit. dicti Domini Regis*) carried away the said Corn, not setting out the Tenth according to the Statute; and upon a *Nil debet* pleaded it was found for the Plaintiff, and it was moved in Arrest of Judgement, first, because of the Plaintiffs own shewing he had no cause of Action against the Defendant, for the interest of the Defendant in the Land was determined, before the Tithes were carried away; but the Court were of opinion, that it was no Exception, for although his interest in the Land was gone, yet he remained Owner of the Corn; for if Corn is cut, although a stranger take them away before severance, yet an Action will lie against him upon this Statute, for otherwise the intent of the Statute may easily be defeated. Another Exception was taken, because the Plaintiff said, he was (*Subdit. dicti Domini Regis*) which is a Fault incurable; for the Statute refers *Subdit.* to his polittick capacity, but *Dicti* goes to his natural and sole capacity; and so the force of the Statute shall be determined by his Death; and for this cause an Indictment upon the 8 H. 6. *Contra pacem dicti Domini*, had been severall times reversed; and of this opinion were three Judges, but *Haughton* doubted of it, and so it was adjourned.

*Action of Debt for Tithes, the Defendants time ended before the Corn carried, yet held good for the Plaintiff.*

*An Action will lie against a stranger, that shall carry away the Corn before the Severance.*

**P***enniworth* versus *Blawe*, *Trin. 11. Jacobi.* The Plaintiff brought an Action of Debt upon an Obligation, and prayed Oyer of the Condition, which was, that he should stand to the Arbitrement of 7 S. of all Suites, Quarrels, Controversies, and Debates, from the beginning of the World untill the making the Obligation, so that the Award be made in writing, under the hand and seal of *N. S.* and

should be delivered to the parties before such a Day, &c. and observe that the Sealing and Delivery of the Obligation was at twelve a clock the first of *May*: the Defendant pleads in Barr, that the Arbitrators made an Award, and did deliver that to the parties above-said, but said further, that in the morning, and before twelve a clock the first of *May* afore-said, one Debate and Controversie did arise between the parties, concerning a Trespasse committed by the Plaintiff the same morning, of which the Defendant gave notice to the Arbitrator, before twelve a clock of the said first of *May*, concerning which Trespasse the Arbitrator made no Award, and therefore pretends the Award to be void, and demands Judgement; to which the Plaintiff demurs; and *Yelverton* being for the Plaintiff, that the Plea was not any Answer to the Plaintiff, and therefore Judgement ought to be given; for the Plaintiffs Action is grounded upon an Obligation, as single, and the thing which helps the Defendant is the Condition indorsed, to stand to the Award of *S.* the which is restrained, so that it be delivered under the hand and seal: and if the Defendant will plead the Condition against the Plaintiff, he must plead it to be performed and executed according to the Submission by the Arbitrator, for else the Bond remains as single: and so in this Case the Defendant pleads; that the Arbitrator made an Award, and that it was delivered by the Arbitrator; but whether it was delivered in writing or under his hand according to the Submission is not pleaded, and therefore it is no Answer to the Plaintiff, for he hath not pleaded an Award made according to the Condition, and therefore the Bond is single. *Yea Cook* argued for the Defendant, and said, that the Plaintiff by the Demurrer had confessed that the Arbitrator had made no Award, as the Defendant had pleaded, and then he shal never have Judgement: for if it may judicially appear to the Court, that the Plaintiff had no Cause of Action he shall never have Judgement; and that the Plaintiff ought to have averred, and joyned with a Traverse of that the Defendant pleaded, to wit, that the Arbitrator had made an Award, and delivered it in writing under his hand and seal without that, &c. and as to the other matter of the Trespasse the same Day, and so he might have demanded Judgement, for his Plea doth but amount to the general Issue, that the Arbitrators made no Award: but *Yelverton* answered, that it could not be pleaded in any other manner then he had pleaded it, because he could not traverse it, because the Defendant himself had pleaded, that he made an Award: and although the Demurrer confesse all matters in Deed, yet they are such onely as are well pleaded, as *Burtons* Case, 5. Rep. 69. And also although the Award pleaded cannot be intended the same Award specified in the Condition, yet the Plaintiff had good cause of Action; and all the Court, *Fleming* being

being absent, were of opinion, that the Plaintiff ought to recover for the Reasons before alleadged, but as for that point whether the Controversie that grew in the morning should be arbitrated, because there cannot be a fraction of Dayes, it was not argued; nor any opinion of the Court delivered, onely *Cook* cited 5 E.4.208. that the Arbitrator ought to arbitrate of that, because the Condition was of all matters, untill the making the Obligation.

**W***Heeler* versus *Hayden, Trin. 11. Jacobi.* *W. Parson* of the Church of *St.* brought an Action of Debt against the Defendant for Arrerages of Rent, and declared upon a Lease made to the Defendant for four years, if the Plaintiff did so long live, and continue Parson, &c. and upon a *Non demist* pleaded, the Jury found an especial Verdict, to wit, that the Plaintiff had leased it to the Defendant for four years, if the Plaintiff shall so long live onely; and whether this Verdict was found for the Plaintiff or Defendant was the Question; and *Cook* Serj. seemed that it was found for the Plaintiff; for the main matter was, that he should lease it, if he so long lived; and the subsequent words are of no effect, because they contained no more then by the Law was before spoke of; for the Law sayes, that if he be non-resident, or if he resign, or be deprived, that the Lease shall be determined, like to the 30. *Ass.* 8. A Lease to two, and the longest Liver of them, and the 17 E.3.7. A. A Lease to one of Land and a House for years, and that the Lessee may make good profit of it, this last Clause in both is idle; and *Dallidge* was of the same opinion; but *Xelverton* against them, for the Plaintiff had intitled himself to the Action by such a Cause; and if he fail in that it is his folly, and shall not recover; for the Lease upon which he declared had two Determinations, the first by Death, the second by removing; and the Jury had found the Lease onely upon the first Determination, and therefore various in substance; and therefore the Jury have found against the Plaintiff, as if a Lease be made by Baron and Feme, if they shall so long live & continue married, both of them ought to be found. *Haughton* to the same purpose, for when a Parson makes a Lease, if he shall so long live, he doth take upon himself, that he will do no Act by which the Lease shall be determined, but onely by his Death, for otherwise an Action of Covenant will lie against him; but if the other Clause be added, to wit, and shall so long continue Parson, then he may resign, or be non-resident without danger, and so there is great difference between the Verdict and Declaration, and it was adjourned the Court, being divided in opinion.



## Dower.

Dower may be brought against the Heir or Committee of the Ward.

**M**Ich. 6. Jacobi. Dower may be brought as well against the Heir himself, as against the Committee of the Ward: but if an Infant be in Ward to a Lord in Chivalry, the Dower shall be brought against the Guardian in Chivalry. If Dower be brought against one who is not Tenant of the Free-hold, the Tenant before Judgement shall be received, and upon Default of the Tenant, and after Judgement he may falsifie.

Nota.

**M**Ich. 9. Jac. Dower demanded of the third part of Tithes of Wooll and Lamb in three several Townes, and it was demanded of the Court, how the Sheriff should deliver Seisin, and the Court held it the best way for the Sheriff to deliver the third part of the tenth part, and the third tenth Lamb, *Videlicet*, the thirtieth Lamb.

He in Reversion received after Default made by Tenant for Life.

In Dower against the Lord *Morley*, the Tenant at the Day of taking of the Inquest after the Jury had appeared, and before the Jury were sworn made Default, and a Pety Cape was awarded, and the Tenant at the Day in Banck informed the Court, that the Tenant is but Tenant for Tenant for Life, and that the Reversion is in one *P.* who at the Return in Banck ought to be received to save his Title, and the Court appointed him at the Return of the Pety Cape to plead his Plea.

Return of the Sheriff adjudged insufficient being too general.

**H**Il. 13. Jacobi. *Allen* and his Wife Demandants *versus* *Walser* in Dower of a Free-hold in *Munden Magna*, *Munden Parva* & *B.* the Sheriff returned *Pleg. de prosequend. f. D. R. R.* And the Names of the Summoners *f. D. & R. F.* And after the Summons made, and by the space of fourteen Dayes and more, before the Return of the said Writ, at the most usual Church Door of *Munden Magna*, where part of the Tenements lay upon the 27. of *October*, being the Lords Day, immediately after Sermon ended in that Church, he publicly proclaimed all and singular things contained in that Writ to be proclaimed according to the Form of the Statute in that behalf made and provided, *L. P. Ar. Vic.* And Exception was taken to the Return, because Proclamation was not made at the Doors of the Churches where the Lands lay, and the Court held it not necessary; but it was sufficient to make Proclamation at any of the Churches; but the Return



turn was insufficient, because he said, that he had caused to be proclaimed all and singular in that Writ contained, and sayes not what; and the Demandant released his Default upon the grand Cape.

**C**lesfold versus Carr. The Tenant in Dower before the value inquired of, and Damages found, brought a Writ of Error, and by the opinion of the whole Court a Writ of Error would not lie, for the Judgement is not perfect untill the value be inquired upon. The Demand in Dower was of the third part of two Messuages in three parts to be divided, and the Judgement was to recover Seisin of the third part of the Tenements aforesaid, with the Appurtenances, to hold to him in severally by Meets and Bounds, and adjudged naught; because they are Tenants in common, and the Judgement ought to be, to hold to him together, and in common; but if it had been in three parts divided, it had been good.

No writ of Error lies until the value be inquired upon.



*Actions in Ejectment.*

**A**llen versus Nash, Hill. 5. Jacobi, rotulo 719. The Plaintiff brought an *Ejectione firme*, and a special Verdict upon a Surrender of Copy-hold Land, which was to the use of the second Son for Life, after the Death of the Tenant and his Heirs, and it was adjudged not to be good in a Surrender; for though it be good in a Will, yet Implication is not good in a Surrender; and in Copy-hold Cases a Surrender to the use, &c. this no use but an Explanation how the Land shall go; if the Lord grant the Land in other manner then I appoint, it is void, if there be found Joynt-tenants, and one Surrender to the use of his Will, it was a Breach of the Joinder, and the Will good.

Implication not good in a Surrender, though it be in a Will.

**E**yer versus Bannaster, Trin. 16. Jacobi, rotulo 719. The Plaintiff brought an *Ejectione firme*, and declared upon a Lease made by Ed. Kynaston; to which the Defendant pleads not guilty, and the Plaintiff alleadges a Challenge, that the Wife of the Sheriff is Cousin to the Plaintiff, and desires a *Venire facias*, to the Coroners, and the Defendant denied it, and so a *Venire* was made to the Sheriff; and at the Assises the Defendant challenges the Array, because the Pannell was arrayed by the Sheriff, who married the Daughter of the Wife of the Lessor; and note, the first Challenge was made after the Issue joyned, and at the Assises the Defendant challenged as above, and a

Challenge because the Sheriff married the Daughter of the Lessors Wife, and held no cause.

Demurrer

demurrer to it, and *Hutton* held, that a Challenge could not be after a challenge, except it were for some cause that did arise after the challenge made, and that the party ought to rely upon one cause of challenge, though he had many causes, & observe the Defendant could not challenge the Array untill the Assises, but *Husband* held that a Challenge might be upon a Challenge, but this challenge was adjudged naught by all the Judges.

**I**ll versus *Stale*, Trin. 16 Jacobi rotulo 5. 18. the Plaintiff brought an *Ejectioe firma*, and declares upon a Demise made to the Plaintiff by *J. C.* bearing date the first of *January*, anno 15. and sealed and delivered the twelfth of *January* following, to hold from *Christmasse*, then last past, for two years, the Jury found a speciall Verdict, and found the Lease, and a Letter of Attorney to execute the Lease, in this manner, that the Lessor was seised of the Land in Fee, and being so seised, he made, signed, and sealed an Indenture of a Demise of the said Tenements, and found it *in hac verba*, this Indenture, &c. and they further found that the Lessor, the said fifth day of *January*, did not deliver the said Indenture of Demise to the Plaintiff as his Deed, but that the Lessor the said fifth day of *January*, by his writing, bearing Date the same Day, gave full power and authority to one *C.* to enter into all the premises and to take possession thereof in the name of the Lessor, and after possession so taken, to deliver the said Indenture of Demise to the Plaintiff, upon any part of the premises in the name of the Lessor, and find the Letter of Attorney *in hac verba*, To all &c. whereas, I the said *J. C.* by my Indenture of Lease, bearing date with these Presents, have demised, granted, and to Farm let, &c. for and during the Term of two years, &c. and they further find, that the said *C.* such a day, as Attorney to the Lessor, by vertue of that writing did enter into the Tenements aforesaid, and took possession thereof to the use of the Lessor, and immediately after possession so taken, the said *C.* did deliver the said Indenture of Demise upon the Tenements, as the Lessors Deed to the Plaintiff, to have, &c. and the doubt was because the Lessor in the Letter of Attorney, and said that whereas he had demised, and if it were a Demise, then the Letter of Attorney was idle, but notwithstanding the Court gave Judgement for the Plaintiff.

**W**eeks versus *Mesey*, An *Ejectioe firma* brought against two, and one of them was an estranger, and was in the house, and the principall would not appear, and the other appeared, and pleaded *non informat*, and the Court was acquainted with the proceedings, and the Plaintiff prayed an *habere facias possessionem*, and the Court told the Plaintiff, that by that Writ and recovery, he could not remove him

him that had Right, when a Lease is made to bring an Ejectment of Land in divers mens hands, then they must enter into one of the parcels and leave one in that place, and then must he go unto another and leave one there, and so of the rest, and then after he hath made the last Entry there, he sealeth, and delivereth the Lease, and then those men that were left there, must come out of the Land, and this is a good executing of the Lease, and *Pasch*, the ninth of *James*, the Court held that an Ejectment would not ly of Common pasture, or of Sheep-gate.

*How to execute a Lease to try a Title, the Land being in many mens hands.*

**B***eamont* versus *Cook*, *Trin.* 13 *Jacobi*. An exception taken in Ejectment, because the Originall was *teste* the very sanie day that the Ejectment was made and adjudged good by the whole Court, and one *Goodhall* brought an originall in Ejectment against *Hill*, and three others, and the Plaintiff counts against three of the Defendants, and no *simulcum* against the fourth, and this matter was moved in arrest of Judgement, And the Judgement was stayed by the whole Court.

*Originall against four, and count against 3. without a Simulcum, and held naught.*

**C***oronder*, versus *Clerk*, *Hill.* 10 *Jacobi* *rotulo*, 3315. Action upon an Ejectment brought, the Jury found it specially upon a Devise, the words of the Will were to my right Heires Males and posterity of my name, part and part like, the question was, who should have the Land, and the Court held, the Land must go to the Heire, at the Common Law, and not according to the words of the Will, because they cannot consist with the grounds of Law, a Will must be construed in all parts, the brother cannot have it by the Devise, because he is not Heir, and the Daughters cannot, for they are not Heirs and posterity, and therefore, neither of them could have it, because they are not Heirs and posterity, because they that take it must be Heir and posterity, for the intent of a Will must be certain and agreeable to Law, and there must not an intent out of the words of the will, be sought out, and the whole Court held, that the Plaintiff was barred.

*The intent of a will must be certain, and agreeable to Law*

**Y***oung*, versus *Radford*, *Pasch.* 10 *Jacobi* *Rotulo* 1515. Action upon an Ejectment brought, and the Jury found a speciall Verdict, and the Case was, that *Elizabeth Rudford*, was possessed of a house full thirty years, and she took a Husband, the Husband and Wife mortgage the Term, the Wife dies, and the Husband redeems the Land, and marries another wife, and then dies, and makes his Wife Executrix, and she maries the Lessor. The Defendant takes Administration of the Goods of the first Woman, and it was held void, and Judgement for the Plaintiff.

*Nota.*

How to execute  
a Lease by Let-  
ter of Attorney

**P**ettifon, versus Reel, Pasch. 12 Jacobi, Rotulo, 2350. An ejectment brought, and Triall, and Verdict for the Plaintiff, and exception taken in arrest of Judgement to the *Venire Facias*, because this word *juratum* was omitted, for the Writ was *posuerunt se in illam*, and omitted the word *juratum*, and this was amended by the Court. When a Title is to be tryed upon an Ejectment, and a Lease to be executed by Letter of Attorney, the course is this, that the Lessor do seal the Lease onely, and the Letter of Attorney, and deliver the Letter of Attorney, but not the Lease, for the Attorney must deliver that upon the Land: and upon an Ejectment brought of Lands in two villages, of a house and forty Acres of Land in, *A.* and *B.* and a speciall Entry in the Land, adjoining to the house to wit, the putting in of a Horse, which was drove out of the Land by the Defendant, and this was adjudged a good Entry for the Land in both the Villages, by the opinion of the whole Court.

A Venire facias of the Parish adjudged good.

**A**rden versus Mich. 12 Jacobi. The Plaintiff delivers, that whereas such a day and year at *Curdworth* in the said County did demise to the Plaintiff two Acres of Land, with the Appurtenances in the Parish of *C.* and the *Venire facias* was of the Parish of *C.* and after a verdict, exception was taken because it was not of *Curdworth*, but it was adjudged good by the Court, and to prove the Lease made *Lanheston* an Attorney swear, that the Lessor sealed the Lease, and subscribed it, but did not deliver it, and by word gave authority to one *W.* to enter into the Land, and to deliver the Lease upon the Land to the Plaintiff as his Deed, and by that authority he entred, and delivered the Lease as his Deed to the Plaintiff, and it was adjudged good.

A mistake of the Curfitor in the Originall amended after Triall.

**M**arsh versus Sparry, Hill. 14 Jacobi Rotulo, 1859. An Ejectment brought *ex dimissione G. W.* and the Originall was made *ex divisione*, and after a Triall, Serjeant *Hitchaw* moved the Court, that the Originall might be amended, and make *ex dimissione*, and the Court granted it, and the Curfitor was ordered to amend it, and also in the end of the Originall, it was written *Barnabiam*, and it should have been *Barnabas*, and that also was ordered to be amended by the Court.

Nora.

**C**radock versus Jones, Trin. 14 Jacobi. Rotulo 2284. An Ejectment brought upon a Demise, made by *Cotton Knight*, the Defendant pleads not guilty, and a Challenge to the Sheriff, and prays a *Venire facias* to the Coroners, because the Sheriff is cozen to the Plaintiff, and shews how, and because the Defendant did not deny it, a *Venire facias* was awarded to the Coroners, and after a verdict, it was alledged

ledged in arrest of Judgement, because it was not a principall Challenge, and a *Venire facias de novo*, awarded to the Sheriff.

**P***arkin* versus *Parkin*, 13. *Hill Jacobi Rotulo* 979. And Ejectment brought and verdict, and after a Triall, Exception taken to pleading, of a Deed inrolled, the Action was brought in the County of *Tork*, and pleaded thus, *ut infra, sex menses tunc proximos sequent. coram milite uno Justic. &c. in West-Riding, Com. Eborum, ad pacem, &c. conservand. Assign. & W.C. Clerico pacis ibidem debito, modo de Recor. irrotular.* and Exception was, because the inrollment was not made according to the Form of the Statute, because it did not appear, that the Justice before whom the Deed was inrolled, was a Justice of the Peace, of the County of *Tork*, but of the *West-Riding*, and it was not alledged, that the Land did ly in the *West-Riding*, and note that the Defendants Plea in Barr, was insufficient, because the Defendant did not confesse, nor avoid the Count, and the Plaintiff by his Replication doth not shew any Title to the Land, because it did not passe by the inrollment, and so he hath lost his Suit, and although the Barr be insufficient, yet notwithstanding, the Plaintiff shall not recover.

*Though the Defendants Plea be naught, yet the Plaintiff shall not recover, because he shewed not any Title by his replication.*

**G***reenely* versus *Passy*, *Hill 5 Jacobi Rotulo*, 808. An Ejectment brought, the Defendant pleads not guilty, and the Jury found it Specially, that one *Woodhouse* was seised of Land in Fee, and did infeof the Husband and Wife, to have and to hold to the said Husband and Wife, and the Heirs of their bodies between them to be begotten, by vertue of which Feoffment, the Husband and Wife were seised of the whole Land in Fee Tail, to wit, &c. the Husband infeofs the youngest Sonne of the land in Fee, and afterwards the Husband dies and the woman survives, and afterwards she dies before any Entry by her made into the Land, and further find the lessor to be the eldest son, of their bodies, and that the younger Son infeoffed the Defendant; and afterwards the eldest Sonne entred into the Land, and made the lease in the Declaration, and whether the Entry of the eldest Son was lawfull, or no, was the question upon the Statute of 32 *H. 8.* that Fines or Feoffements made by the Husband, &c. during coverture be or make any discontinuance, &c. or be hurtfull to the said wife, or her Heirs, and Sir Edward *Cook* held, that the Heir is not barred of his Entry by the Statute.

*The question is upon the Statute of 32 H. 8. upon Feoffments made by Husbands during the coverture.*

**P***acy* versus *Knollis*, *Trin. 6. Jacobi Rotulo* 291. An Ejectment brought, the Defendant pleaded not guilty, and the Jury found it Specially, and the question is upon the words of the Will, to wit, And I give to *Katharine* my Wife, all the Profits of my

*A verbal overment shall not overthrow a will.*



The mistaking  
of the Town  
not hurtfull in  
a will.

Houses and Lands lying and being in the Parish of *Billing*, and *L.* at a certain street there called *Broke-street*, and the Jury found that there was not any Village or Hamlet in the said County called *Billing*, and that the Land supposed to be devised lieth in *Byrling-street*; no mans verbal Averment shall be taken, or admitted, to be contrary to the Will, which is expressly set out in the Will. If I have two *Thomas* to my Sonnes, and I give it to *Thomas*, it shall be intended my youngest Son, because my eldest Son should have it by Discent, the Will was held by all the Court to be good.

Property of  
Goods cannot  
be in obay-  
ance.

**H**ellam versus *Ley*, *Trin. 7. Jacobi*, rotulo 2718. A special Verdict in an *Ejectione firme*, the Question was upon the words of the Will, which were, that her Husband had given all to her, and nothing from her, and whether these words imply a consent, and so an Agreement to the Devise of the Husband or no. And *Foster*, *Warburton*, and *Walmesley*, that it was an Assent; but Sir *Edward Cook* was of a contrary opinion: and note she was made sole Executrix, and she proved the Will, and Justice *Foster* held it to be an Assent in Law. The property of Goods cannot be in obayance, they must be in the Executor, Administrator, or Ordinary; and *Warburton* held, that the words made an Assent, and said, that when the Bond is delivered to one to the use of another, untill he dis-assent, it is his Deed; but when he dis-assenteth, then it is not his Deed, *Ab initio*: if a Lease be given by Will to divers, and made one of them his Executor, in this Case the Executor must make his special Claime, else he must have it as Executor: and Sir *Edward Cook* held, that the general Entry, and proof of the Will is no Assent, she must first have it as an Executor, before she can have it as a Legatee, a Legacy is waiveable; but if the Law work it in me whether I will or no, then I cannot waive it, and therefore he held she should enter specially.

Difference be-  
tween Pre-  
scription and  
Custome.

**R**olles versus *Mason*, *Hill. 6. Jacobi*, rotulo 2613. An Ejectment brought, and the Question grew upon two Customes, one was that the Copy-holder for Life may name to the Lord of the Mannour who should be his Successor in the Copy-hold: and the other that the Copy-holder for Life may cut down all the Trees of wrong upon the customary Land: and the third Question was, whether the second Lessee of the Mannour may take advantage of the pretended Forfeiture for cutting down the Trees, by the Law a Copy-holder shall have, house-boot, free-boot, and hedge-boot, and common of Turbary to burn in his house, but he cannot sell them. A Copy-holder by Custome may name his Successor, and if the Lord refuse to admit him, the Homage may set a reasonable Fine, and so he shall be admitted. The Lessee of the Mannour may take advantage of the Forfeiture

ture, but in this Case it is no Forfeiture, and the Copy-holder may cut downe Trees, for he hath a greater Estate then a sole Tenant for Life, because he shall name his Successor: APrescription goeth to one man, and a Custome to many; and Judgement for the Defendant.

**M***ason* versus *Strecher & alios*, *Pasch. 7. Jacobi*, *rotulo 606*. An Ejectment brought for the Mannour of *P*. it was held by the Court, that the consent of a Servant in the absence of him who is possessed of the Terme shall not out his Master of the Possession, because the Servant hath no interest in the Land.

**C***ramporne* versus *Freshwater* *Pach 8 Jacobi rotulo 2742*. An action of Debt brought upon an Ejectment, the Plaintiff was non-suit upon his own Evidence because he declared upon a Devise made for three years, and it was confessed by the Plaintiff that the Lands were Copy-hold Land, and that the Plaintiff had not license to demise them for three years neither could he prove; that by any custome he could demise them for three years without a license, and so the Lessor was taken for a Disseisor by the opinion of the Court.

*Copyhold Land cannot be demised for three years without license or custome.*

**C***affe* versus *Randall Trin. 9. Jac. rotulo 3299*. An Ejectment brought against *Randall* and his Wife, the Ejectment made by the Wife and not guilty, pleaded and tried; and it was moved in Arrest of Judgment, because the Issue was pleaded in this manner, *Et dicunt quod ipsi in nullo sunt culpabiles, &c.* And the Ejectment was made by the woman alone, and ought to have been that she was not guilty, and upon examination of the Plea Rol and Record of *Nisi prius* it appeared to the Court that the Plea Roll was right but the Record of *Nisi prius* mistaken, but Serjeant *Barker* said that at the time when the Record of *Nisi prius* was tried, the Plea roll agreed with the Record, and was afterwards amended. and *Waller* the prothonotary confessed, that he amended the plea rol, as upon his private examination of the roll but without notice that there was a Record sent down to try that Issue, and therefore the Court ordered that the Record of *Nisi prius* should be amended according to the Plea roll which was done accordingly.

*Record of Nisi prius amended by the Roll.*

**P***ats* versus *Chitty Trin. 9. Iac. rotulo 2151. vel 2151*. An Action of Ejectment brought, the Defendant pleads a concord with satisfaction in Bar, the Plaintiff demurs, and it was held by *Winch* and *Foster* a good Plea because the Action is not only in the realty for he recovers damages and possession which are meer Chattells. Secondly, Because the Defendant pleads the satisfaction as in discharge of that Action

*Concord with satisfaction a good Plea in Ejectment.*

tion and all others and ten shillings for rests, *Warburton* of the same opinion, and he vouched the like case satisfaction is good. Plea in a *Quare impedit* wherein a man recovers the presentation: And *Cook* said, that in all Actions wherein money or Damages are recoverable as well wherein the Defendant might wage his Law as wherein he might not, it is a good Plea *Pasc. 3. Jacobi rotulo 1033. Eden and Blake*, but in matters where one Free-hold or Inheritance is recoverable, concord is no Barr and in dower recompence in other Lands or Rent is no Barr. But by petition in Chancery, but Rent Issuing out of the same Land demanded is a good Barr; and in all Actions *Quare vi & armis* wherein process of Outlary lies by the common Law, concord or an Award is a good Barr, 38 H.6. title Barr satisfaction in trespass by an Estranger is a good Barr although it be without notice of the trespassor by the opinion of the whole Court.

*Misconveyance of process, what it is, and helped by the Statute.*

**C**Raddock versus *Iones Trin. Jacobi rotulo 2284.* An Ejectment brought, and declares upon a Lease made by *W. Cotton* Knight, the Defendant pleads not guilty, and makes a challenge and praies a *venire facias* to the Coroners because the Sheriff is Cozen to the Lessors Wife which is not a principle challenge but by favour, and after a Triall and Verdict it was amended in arrest of the Judgment because it was mistried and *Barker* vouched a case in the Exchequer Chamber, in 43 El. upon a Writ of Error, between *Higgins*, and *Spicer*, upon a *Venire facias*, awarded in the like manner, and it was adjudged to be mistried, and it was then agreed that misconveyance of process is, where one Writ is awarded in place of another to an Officer which of right ought to execute that process, and he returns it, this is helped after a Verdict by the Statute. But if a writ be awarded to an Officer who ought not to execute that process, and he returns it, this is a mistriall and not helped by the Statute and *Warburton* said that *Dyer folio 367.* To the contrary is not Law, two Tenements in Common joyne in a Lease for years to bring an Ejectment and declare that whereas they did demise the Tenements and it was held nought for it is a severall Lease of moities; and if they had declared, that one of them had demised one moiety and the other another moiety it had been good.

*A feme covert cannot make a Letter of Attourney to deliver a Lease upon the Land.*

**W**ilson versus *Rich, Pasc. 44. Eliz.* The Husband and Wife joyn in a Lease by Indenture to *A.* rendring Rent, and this is for years, and make a Letter of Attourney to seal and deliver the Lease upon the Land, which is done accordingly; *A.* brings an Ejectment and declares upon a Demise made by the Husband and Wife, and upon Evidence to the Jury ruled by *Popham, Fenner, and Yelverton*, that the Lease did not maintain the Declaration, for a Woman covert could

could not make a Letter of Attorney, to deliver a Lease upon the Land, although Rent was reserved by the Lease, and so the Warrant of Attorney is meerly void, and the Lease is onely the Lease of the Husband, which is not made good by the Declaration, by the opinion of the Court.

**S**Tretton versus *Cush, Pasch. 1. Jacobi. 7. L.* leased a House for four-score years, in which Lease there is one Condition, that the Lessee his Executors and Assignes should keep and maintain the House in reparation, and if upon lawfull warning given by the Lessor, his Heires and Assignes, &c. to enter; the Lessee for fourscore years leases the House to *A.* for thirty years; and *A.* leases it to *Wilmore* for fifteen years; the Assignee of the Reversion came to the House, and seeing it in decay gave warning to *Wilmore* then possessed of that House to repair it, which was not done within six Moneths, by reason whereof the Assignee entred for the Condition broken, and upon a Not guilty pleaded, the matter before recited was found by a special Verdict, and adjudged against Sir *William Wade* the Assignee of the Reversion, for the warning given to *Wilmore* to repair, who was but an under tenant, was not good, for he was not Assignee of the terme, nor had but a pety interest under the grand Lease, upon whom no Attorney could be made for the Rent, nor any Action of Waste brought against him, for there wanted the immediate privity: and in this Case there is a difference to be taken between a rent and a Condition for reparations, for the Condition is meerly collateral to the Land, and meerly personal, and therefore warning is not of necessity to be given at the House, but notice of Reparations ought to be given to the person of the Lessee, who had the grand interest. And a Difference is to be taken between a time certain in which a thing is to be done, and a time incertain; for in the Case of Rent reserved at a Day certain, Demand thereof must be made upon the Land onely, because the Land is the Debtor; for *Popham* said, that if the Lessor should come and demand his Rent, and there should meet with *J. S.* a stranger, and should say to *J. S.* Pay me my Rent, this is no good Demand of the Rent, having mistaken the person who is chargeable with it: but in this Case one general Demand of Rent, without reference to any person who is not chargeable, is good. And he was of opinion, that if a man lease Land, rendring Rent for a year, whensoever the Lessor should demand it, in this Case the Lessor come and demand it before the end of the year, his Demand upon the Land is not good, except the Lessee be there also; for the time being incertain, when the Lessor will demand it, he ought to give notice to the Lessee of it. And if the Lessor come to the Lessee in person, and demands the Rent, yet it is not sufficient; for although notice is to be given the Lessee in person,

yet

*when a demand shall be made to the person, and when upon the Land.*

yet the Land is the Debtor, and therefore the Law ties the Lessee to the Land, as to the place in which he shall be paid; but if the Lessor stay untill the end of the year, then the Lessee at his peril ought to attend upon the Land to pay it, for the end of the year is time of payment prescribed by the Law which was granted, and Judgement was given for the Plaintiff.

*A Lease made to three for their lives, with a Covenant that the Land should remaine to the survivor of them for ninety yeares, a good interest in the survivor.*

**C**Lerk versus Sydenham, Pasch. 4. Jacobi. An Ejectment brought by the Plaintiff of a Lease made of Land by P. and B. and Not guilty pleaded: and the Evidence of the Defendants part was by reason of a Lease of the Land in Question, made by the Abbot of Cleeve, before the Dissolution to W. D. and Jo. his Wife, and F. their Daughter for their Lives by Indenture; and by the same Indenture the Abbot covenants, grants, and confirms to the three Lessees, that the land should remain to the Assignee of the Survivor of them for ninety years; Fr. survived, and took to Husband one Hill, who the 20 Eliz. grant their Estate for life to J. S. and all their interest in the Remainder, and all their power for all the term, and this by mean Assignments came to the Defendant: and whether any interest passed in Remainder by the Lease of the Abbot was the Question; and by all the five Judges it was held to be a good interest in possibility, and to be reduced into a certainty in the person of the Survivor; as where Land is given to three and the right Heirs of the Survivor, this is a good limitation of the Inheritance presently, but it is in expectancy untill the Survivor be known, for then the Fee is executed in him. And Popham vouched a Case in his experience, 17 Eliz. in which Sergeant Baker was of Counsel, and it was a Lease was made to Husband and Wife for life, and for forty years to the Survivor of them, the Husband and Wife joyn in Grant of this Interest: and although it be certain, one of them shall survive, yet the Grant is void, because at the time of the Grant there was not any interest, but only a possibility in either of them: and although in the Case in Question the Remainder is not limited to any of the three Lessees, but to the Assignee of the survivor; yet the Court was of opinion, that this was not a bare nomination in the survivor to appoint what person he pleased, but a terme and an interest; and Popham took this difference, if a Lease be made to J. S. for life, and after his death to the Executors and Assignes of J. S. this is an interest in J. S. to dispose of it, but if it had been limited to J. S. for life, and afterwards to the Executors and Assignes of J. D. here this is a bare power in J. D. and his Executors, because they are not parties or privies to the first interest which was agreed, and it was also agreed, that whether it was an interest or a word of nomination, it was all saved to the party by the Statute of 31 H. 8. of Monasteries, which gives the Houses dissolved



to the King, but in the same degree and qualitie as the Abbot had them. And the Abbot was charged with the power given by himself, and so was the King. Which mark.

**VV** *Anto* versus *Willingsby*, *Pasc. 5. Jacobi*. The Bishop of Exeter in the time of *H. 8.* by his Deed gives Land, &c. to *Nicho: Turner*, and by Bill his Cousin in consideration of service done by *Turner*, and for other considerations him moving to them, and the Heirs of their bodies, and dyes: They have Issue *Jo.* and *William*, *N. T.* dies, and *Sybil* marries *Clap.* and they alien the Land to *Iohn* in Fee; *Sybil* and *Iohn* leave a Fine to *Walther* in Fee of the Land. And afterwards *Sybil* infeoffes *William* her younger Son, who infeoffes *Willingsby*, *Lo:* enters, and leaseeth to *Walther* and *Willingsby* for the tryall of his title, seals a Lease to ward, who declares of so many Acres in *Sutton Coseild.* And the Jury upon a not guilty pleaded found by the Verdict that the Bishop gave the Tenements aforesaid by his Deed, the tenor of which Deed follows, &c. And by the Deed it appeared that the Lands did lye in *Little Sutton* within the Lordship of *Sutton Coseild.* And notwithstanding the Plaintiffe shall recover. For first it was held not to be any Joynture within the Statute of *11 H. 7.* for it is not any such gift as is intended by the Statute, for the Bishop was not any Ancestor of the Husband, and the Husband took nothing by that, but it was a voluntary recompence given by the Bishop in reward of the service passed. And the Statute intended a valuable consideration. And also the Bishop might well intend it for the Advancement of the woman, who appeared to be Cozen to the Bishop. And *Taufeld* held if the woman were a Dones within the Statute of *11 H. 7.* she could be but for a moyetie, for the gift was before the marriage, and then they took by moyeties. And the Baron dying, first the woman came not to any part by the husband, but by the course of Law as survivour. But *quare* of this conceit, for the other Judges did not allow it. And secondly, they held that the Fine of *Lo.* the elder Son of *Sybil* levied to *Walther* destroyed the entry of *Lo.* and of *Walther*. For although in truth the Fine passed nothing but by conclusion, yet *Lo.* the Son, and *Walther* his Conusee shall be estopped to claim any thing by way of forfeiture against that Fine on the womans part, then any title accruing after the Fine. For they shall not have any new right, but *Lo:* the Son upon whom the Land was intayled is barred by the Fine. Thirdly, although upon view of the Deed made by the Bishop the Land which by the Declaration is layed to be in *Sutton Coseild*, by the Deed appears to be in *Little Sutton*, yet this is helped by the Verdict, by which it is found expressly that the Bishop gave the Lands within written, and therefore being so precisely found the Deed is not materiall. Which mark.

*A precise Verdict makes the Declaration good, which otherwise is naught.*

T

*Knap.*

A demand of  
Rent to avoid  
a Lease upon a  
condition ought  
to be in the most  
open place.

**K** *Nap versus Peir Jewelch Pasc. 5. Jacobi.* An Ejectment brought for Lands in *Wiccombe*, which were the Deans and Chapters of *Chichester*, And in this case it was agreed by the whole Court, that if it be a Corporation by prescription, it is sufficient to name them by that name they are called. And the Court held, that if a man demands Rent upon the Land to avoid a Lease upon a condition, the Demand ought to be made in the most open place upon the Land; The Dean and Chapter of *Chichester* made a Lease to one *Raunce*, the Lessee of the Defendant of Lands in *Wiccombe*, rendring Rent payable at the Cathedrall Church of *Chichester*, upon such a condition, it was agreed by the whole Court, that the Demand ought to be made in the Cathedrall Church of *Chichester*, although it was of the Land Leased. And the Demand ought to be made at the setting of the Sun the last instant of that day, and when he made his Demand, he ought to stand still, and not walk up and down, for the Law did not allow of walking Demands. As *Pipham* said, and he ought to make a formall demand. And because those whom the Dean and Chapter did send to make the demand of Rent said, bear witness, we are come hither to demand and receive such Rent, it was held by the Court, that such a demand was not good. And they held the demand ought to be made at that part of the Church where the greatest and most common going in is. And in this case it was said by *Popham*, that if a man make a Lease to one for yeers to commence at a day to come, and then he lease to another for yeers rendring Rent upon a condition to commence presently. And he enter. And the first Lease commence, and he enter the Rent, and Condition reserved upon the second Lease is suspended. A man leases for years rendring Rent, & after he leaseth to another to commence at a day to come, and the first Lessee attorns, the second shall not have the Rent reserved upon the first Lease by *Popham*; but he doubted of it. And *Popham* and *Tanfeild* held, none contradicting, that the Letter of Attorney made by the Dean and Chapter to demand their Rent was not good, because the Letter of Attorney was to make a general demand on any part of the Land, which the Dean and Chapter had leased. And that ought to have been speciall onely for that Land. And secondly, it was to demand Rent of any person to whom they had made a Lease. And the Letter of Attorney ought to be particular, and not generall of any person.

After an  
Imparllance  
cannot plead in  
abatement.

**T** *Ompson versus Collier, Mich. 5. Jacobi.* The Plaintiffe declares upon a Lease of Ejectment made by *Robinson* and *Stone* of one Messuage, and fourty Acres of Land, in the Parish of *Stone* in the Countie of *Stafford*. The Defendant imparled tryall another Terme, and then pleads that within the Parish of *Stone* there were three Villages,

A. B

A. B. and C. And because the Plaintiff hath not shewed in which of the Villages the Land he demanded Judgement of the Bill, &c. And the Plaintiff demurred upon this Plea; And adjudged for the Plaintiff. For first, after an *Imparance* the Defendant cannot plead in abatement of the Bill, for he hath admitted of it to be good by his entering into defence, and by his *Imparance*. And secondly, the matter of his Plea is not good, because the Defendant hath not shewed in which of the Villages the House and fourty Acres of Land did lye; And that he ought to have done. For where a man pleads in abatement, he alwayes ought to give to the Plaintiff a letter writ with mark. And the whole Court held that this Plea was not in barr, but that he should answer over. And *Williams* Justice took this difference, that when a man demurs upon a Plea in abatement; And when he goes to issue upon it, for if they descend to issue upon such a Plea, and it be found against the Defendant, it is peremptory, and he shall loose the Land: but upon demurrer it is not peremptory, but onely to answer over. Which mark.

22 H. 6. 6.  
Foxlies Case. 5  
Rep. 111.

**VV** *Orkley versus Granger, Mic. 5. Jacobi.* An Ejectment brought for two Houses, and certain Lands, &c. And upon a speciall Verdict, The case was one *Hen: Wells* and his wife nere seiled of a parcel of Land to them, and the Heirs of their bodies begotten, as for the joynture of the wife, the remainder to the Heirs of the Husband in Fee, the Husband bargains, and sells the Land to *Stump* and his Heirs in Fee. And afterwards the Husband and one *Winter* leavie a Fine of that Land to another who grants that Land back again to *Winter* for one month, the remainder to the husband and wife, and the heirs of their bodies to be begotten, the remainder to the husband and his heirs. The Husband dyes, the Wife survives, and makes a Lease to the Defendant for ninety nine yeers, if she should so long live; the woman dyes, and the Plaintiff claims under the bargainee: and in this Case two points were debated. First, what Estate passed to the bargainee, and *Digges of Lincolnes Inne*, who argued for the Plaintiff, that the bargainee had a Fee simple determinable which issued out of both the Estates as it was held by *Periam in Alton Woods Case*. And he said that the Proclamations upon the Fine are but a repetition of the Fine, as it is held in *Bendlones Rep:* put in the Case of Fines in *Cooks 3. Rep.* And see *Pinslees Case*, for then for the same cause the Issue in tayl is bound, although the Fine be levied by the Husband alone by the Statute of the 4. H. 7. and 32 H. 8. because he cannot claim out as Heir to the Father, as well as to the Mother, and therefore his Conveyance is bound: and see 16. E. 3. 332. Husband and Wife Tenants in speciall tayl. The husband is attainted of Treason, and executed having Issue, the woman

man dyes, the Issue shall never have the Land. And if husband and wife Tenants in speciall tayl; And the Husband levies a Fine to his own use, and devises the Land to his wife for life which remained over rendring Rent; the husband dyes, the woman enters, pays the Rent, and dyes, the Issue is barred for two causes: first by the Fine which had barred his Conveyance of the intayl: secondly, by the Remitter waived by the Mother. 18 *Eli: Dyer* 531. See 5 *H. 7. Assise Thorp and Tirrels Case*. Secondly, the Lease made by the woman was determined by her death, and it was said that the woman had not any qualitie of an Estate tayl, but onely she might take the profits during her life within the Statute of 31 *H. 7.* And when she dyes the Estate is denised. See *Ausens Case*. Doctor *Wjat* Tenant in tail leased for yeers, And dyed without Issue, the Lease was determined. See first of *Eliz: title Executors.* And 31 *H. 8. Dyer*. Where a Bishop made a Lease for yeers, and afterwards makes another Lease to one of the Lessees, &c. And *Fleming* held that if the woman survived as under Tenant in speciall tayl, and made a Lease for 21. yeers, it is out of the Statute of 32 *H. 8.* and so it was adjudged in *Wattes and Kings Case*.

The day of a Copihold of Court roll traversed, and adjudged naught.

**L**ane versus *Alexander Hill*, 5. *Jaco*. The Plaintiffe declares in Ejectment upon a Lease made to him by *Mary Planten* for three yeers, the Defendant saies, &c. that the Land is Copihold Land of the Mannor of *H. in Norff.* whereof the Queen *Eliz:* was seised in Fee, and long time before the Lessor had any thing there in Court such a day, that *J. S.* her Steward at the Court, &c. granted the Land to the Defendant by Copie in Fee, according to the custome, and so justifies his entry upon the Plaintiffe. The Plaintiffe replies and saies, that long time before the Copy granted to the Defendant, to wit, at a Court of the Mannor held such a day, the 43. *Eliz:* the Queen by Copy, &c. granted the Land to the Lessor for life according to, the custome, by force whereof he entred, and made a Lease to the Plaintiffe. The Defendant by way of rejoinder maintained his barr, and traverses: with that the Queen at the Court of the Mannor by *J. S.* her Steward, such a day, &c. granted the Land to the Lessor and upon this the Plaintiffe demurred in Law generally. And *Telverton* moved that the traverse was good in this Case upon the day, and Steward: and the difference is where the act done may indifferently be supposed to be done on the one day or the other, there the day is not traversable as in the Case of a Deed made such a day; there the day of the Deed is not traversable, for it passes by the livery, and not by the Deed. And the livery is the substance, and the day but a bundance. 10 *E. 4.* And the Law is the same, if the day in arespasse wherein the day is not traversable. For although it be done upon

upon another day it is not materiall. But when a man makes his title by an especiall kinde of Conveyance, as in this case, the Plaintiffe makes his title by one Copy, there all that is concerned in the Copy is materiall, and the party cannot depart from it, for he claims not the Land by any other Copy but by that which is pleaded, as is in the 18 H. 6. 14. where an Action is brought for taking his Servant, and counts that he by Deed retained with him his Servant the *Monday* in one week, in such a case it is a good plea for the Defendant to say, that the Servant was retained by him such a day, after without that that the Plaintiffe did retain him the *Monday*. And the Law seems to be concerning Letters Patents, wherein the day and place are traversable, being the speciall conveyance of the party from which he cannot depart. And also it seems that although the day in the principall case be traversed, yet the Statute of 18 Eliz: of Demurrers aids it, it being but a generall Demurrer, and the day being onely matter of form. But the whole Court were of opinion, that the day was not traversable in this case. For the Queen granting an ancienter Copy to the Plaintiffs Lessor then to the Defendant, and the traverse should have been without this, that the Queen did grant in manner and form, &c. to the Plaintiffs Lessor, and the Case is the same in the Letters Patents, for there the traverse should be without this, that the Queen granted in manner and form, &c. And the day and place shall not come into the traverse. But Justice Fennor was of a contrary opinion, for the Reason delivered by Telverson before, and he also, and the Lord cheif Justice held it to be holpen by the Statute of 18 Eliz: for it is but matter of form. For if the Jury finde a *prior* grant of the Queen to the Plaintiffs Lessor, although it be at another Court it is sufficient; and so by consequence the day is not materiall in substance, which mark. But Williams Justice, and the rest held the traverse to be naught, for by that the Jury should be bound to finde the Copy such a day by such a Steward which ought not to be, and that it was matter of substance not helped by the Statute of 18 Eliz.

**D**Arby versus *Briz Hil. 5. Jacobi*. An Ejectment brought for an House in London, and upon not guilty pleaded, The Jury found a speciall Verdict; And the case was Tenant in tail of divers Messuages in London, 7 January, 44 Eliz: bargains and sels the said Houses to J. S. and delivers the Deed from off the Land the 8. of January the same year. Indentures of Covenants were made, to the intent to have a perfect recovery suffered of those houses; and the ninth of January after a Writ of right is sued in London for those Messuages returnable at a day to come. And the tenth of January the same year the Tenant in tail makes livery and seisin to J. S. of one of those Houses

*Houses in London passe by the delivery of a bargain and sale without indentment.*



Houses in the name of all. And the other Messuages were in Lease for years, and the Lessees did not attorn. And the question was if the Messuages passed by the bargain and sale, or by the livery. And it was adjudged that they passed by the bargain and sale. And *Telverton* took a difference between severall Conveyances both of them Executory, and where one of them is executed presently, as in Sir *Rowland Heywoods* Case, where divers Lands were given, granted, leased, bargained, and sold to divers for years; the Lessees were at election whether they would take by the bargain and sale upon the Statute of 27 H. 8. or by the demise at the Common Law. But otherwise it is if one be executed at first, for then the other comes too late, as it is in this Case; for by the very delivery of the bargains and sale, the Land by the custome of *London* passes without inrollment, for *London* is excepted, and this custome was found by the Verdict. And therefore it being executed, and the Conveyance being made perfect by the delivery of the Deed without any other circumstances, the livery of seisin comes too late, for it is made to him that had the Inheritance of the Messuage at that time. And the possession executed hinders the possession executory, for if a bargain and sale be made of Land, and before inrollment the bargain takes a deed of the said Land, this hinders the inrollment, because the taking of the livery did destroy the use which passed by the bargain and sale which was granted by the Court. And another reason was given, because it appeared that the intent of the parties was to have the Land passe by the bargain and sale; because it was to make a perfect Tenant to the *Precipe*, as appears by the subsequent acts, as the Indentures Covenant, and the bringing the Writ of Right, &c. All which will be made frustrate, if the livery of seisin shall be effectuell: and when an Act is indifferent, it shall be taken most neer to the parties intents that may be if a man hath a Mannor, to which an advowson is appendant, and makes a Deed of the Mannor with the appurtenances; And delivers the Deed, but doth not make livery of seisin, yet now although the Deed in it self was sufficient to passe the *Advowson*, yet because the party did not intend to passe it in *Posse*, but as appurtenant if the Mannor will not passe, no more shall the Advowson passe alone, as it was agreed, 14 *Eliz.* in *Andrews* Case. Which mark. And the whole Court gave Judgment accordingly, that the Defendant who claimed under the bargain & sale, should enjoy the Land.

An Ejectment  
will not lie de  
aqua cursu.

**C**Halloner versus Thomas, Mich. 6. Jacobi. A Writ of Error was brought upon a Judgement given in Ejectment in the Court of *Carmarthen*, and *Telverton* assigned the Error, because the Ejectment was brought de aqua cursu, called *Lothar* in L. and declares upon a Lease made by D. de quidam rivulo & aqua cursu: And by the opinion of

of the whole Court the Judgement was reversed, for *rivulus seu aque cursus* lye not in demand, nor doth a *precipe* lye of it: nor can livery and seisin be made of it, for it cannot be given in possession, but as it appears by 12 H. 7. 4. the Action ought to be of so many Acres of Land covered with water, but an Ejectment will well lye by, if a stang for a *precipe* lies of them, and a woman shall be indowed of the third part of them, as it is 11. E. 3. But if the Land under the water or River do not pertain to the Plaintiffe, but the River onely, then upon a disturbance his remedy is onely by Action upon the Case, upon any diversion of it, and not otherwise. Which observe.

**V**Ilson versus Woddell, Mich. 6. Jacobi. The Grand-father of the Plaintiffe in an Ejectment being a Copy holder in fee, made a surrender thereof to L. Woddell in fee, who surrendred it to the use of Margery I. for life, who is admitted, &c. But L. Woddell himself never was admitted. The Grandfather and Father dye, the Son who is Plaintiffe was admitted, and enters upon the Land: Margery being then in possession, and the Defendant then living with her as a servant in those Tenements, and this was the speciall verdict, And Judgment was given for the Plaintiffe. And the Court was of an opinion, that the Defendant was found to be a sufficient Trespaffor, and Ejector, though he be but a Servant to the pretended owner of the Land, because the Verdict found that the Defendant did there dwell with Margery. And in such case he had the true title and had made his entry, might well bring his Action against Master or Servant at his election. And perhaps the Master might withdraw himself that he could not be arrested. And secondly, it was adjudged, that the surrender of J. S. of a Copy-hold is not of any effect, untill J. S. be admitted Tenant. And if I. S. before admittance surrender to a stranger who is admitted, that that admittance is nothing worth to the stranger. For J. S. had nothing himself, and so he would passe nothing, and the Admittance of his grantee shall not by implication be taken to be the admittance of himself; for the admittance ought to be of a Tenant certainly known to the Steward, and entred in a Roll by him; and it was held, that the right and possession remained still in him that made the surrender, and that is descended to his Heir, who was the Plaintiffe. And they took a difference between an Heir, to whom the Copy descended, for he may surrender before admittance, and it shall be good; because he is by course of the Law, for the custome that makes him Heir to the estate casts the possession of his Ancestors upon him: but a stranger to whom a Copy hold is surrendred, hath nothing before admittance, because he is a purchafor. And a Copy made to him, upon which he is admitted, is his Evidence by the custome, and before that

*A Servant is a sufficient Ejector, if he dwell with the pretended owner.*

*He that is a Purchafor of Copihold hath nothing in it, nor can he surrender to another before admittance.*

that he is not a customary Tenant, and so he could not transfer any thing to another, and adjudged so according to 24 *Eliz.* Alderman *Dixie's Case*.

*How an Abatement shall be traversed.*

1 *E.* 4. *acr.* -  
1 *E.* 4. 9. *acr.*

**B** *Edell versus Lull, Pasch. 7. Jacobi.* The Plaintiffe declares in Ejectment upon a Lease made by *Eliz. James* of certain Lands. The Defendant pleads that before *Eliz.* had any thing, one *Martin James* was seised in fee of it, and had issue *Henry James*, and dyed seised, by reason whereof it descended to *H. J.* as Son, and Heir; and that *Eliz.* entred, and was seised by abatement, and made the Lease to the Plaintiffe: and that afterwards the Defendant as servant to *H. James*, and by his command, &c. The Plaintiffe by way of replication confesses the seisen of *M. James*, And that he being so seised by his last Will in writing, devised the said Land to *Eliz.* in fee, and afterwards dyed seised by reason whereof she entred by force of the devise, and made the Lease to the Plaintiffe, and traverse without, that *Eliz.* was seised by abatement in manner and form, &c. And the Defendant demurrs upon this replication, and shewed for cause that the traverse was not good, and adjudged for the Defendant: for the Plaintiffe by his replication need not both confesse, & avoid, and traverse the abatement too, for the Plaintiffe made a title to his Lease by the Will of his Ancestor, and that proved that he entred legally, and not by abatement, as the Defendant had supposed. And then to take a traverse over makes the replication vitious. For a traverse shall not be taken, but where the thing traversed is issuable. And here the devise is onely the title issuable. And it was also held that the traverse was not good as to the manner of it, for he should not have traversed without that, that he was seised by abatement, but it ought to have been without that, that he did abate; and also if the Plaintiffe had minded to have fully answered the Defendant, he ought to have took his traverse in the very same words the Defendant had pleaded it against him, to wit, without that, that he did enter, and was seised by abatement, which observe. The Case concerned Sir *H. James* to whom the Defendant was Tenant.

*The Bill amended after a Writ of Error brought and before the Record was removed.*

**S** *Aunders versus Cottingham, Mich. 7. Jac.* An Ejectment brought of two Houses, but the Bill was onely for one, and it was filed. And the Defendant by his paper book pleaded to both Messuages; And the Roll in Court, and the Record of *Nisi prius* were two Houses. And there was a verdict for the Plaintiffe, and Judgement entred accordingly. And a Writ of Error was brought by the Defendant, and before the Record was removed, the Plaintiffe moved the Court that the Bill upon the file might be amended, and made two Messuages. And because the Defendant had pleaded to Messuages in

in his Answer in paper, and that the Roll and Record were according, it was resolved by the whole Court, that the Bill upon the File should be amended, and made two Messuages; for that Bill which made mention onely of one House could not be the ground of all the proceedings afterwards; but it was as if no Bill had been filed, and therefore it should be supplied, and so had been severall times before the Record was renewed. Which observe.

**T**He Plaintiffe declared in Ejectment upon a Lease of an House, 10 Acres of Land, 20 Acres of Meadow, 20 Acres of Pasture, by the name of one Messuage, and ten Acres of Meadow be it more or lesse, and upon not guilty pleaded the Plaintiffe had a Verdict, but moved in Arrest of Judgement, and Judgement was stayed. For by the Plaintiffs own shewing in his Declaration, he could not have Execution of the number of Acres found by the Verdict; for in the Lease there is but ten Acres demised. And these words *more or lesse* could not in judgment of Law be extended to thirty or fourty Acres; for it is impossible by *common intendment*, and the rather because the Land demanded by the Declaration is of another nature then that which is mentioned in the *per nomen, &c.* For that is only of Meadow, and the Declaration is of arrable and Pasture.

*where the Per nomen destroys the quantity in the declaration.*

**M**ore versus Hawkins, Mich. 8. Jacobi. In Ejectment after issue Joyned upon a not guilty pleaded, the cause came to be tried before Brook and Telverson, Judges of Assize in the County of Oxford, the Plaintiffe had declared of divers Messuages, and divers Acres of Land lying in three Villages in the said County. And at the tryall before the Jury was sworn, Walter the Defendants Counsell put in a Plea, that after the last continuance, to wit, such a day in Trinity Terme before the day of Assize, to wit, the 20. of July, the Assizes being held at Oxford, the 21 of July the Plaintiffe had entred into such a Close by name containing eight Acres, parcell of the premises specified in the Declaration, &c. and this Plea was received by the Judges of Assize. And afterward in Mich. Terme Telverson and Walter being of Counsell with the Defendant, desired that they might amend their Plea, to wit, to put in the very Village where the Land did lye, into which the entry of the Plaintiffe was, because it was but matter of form, and not of substance: and they were of opinion, that the tryall of that new Issue ought to be of all the three Villages named in the Declaration. And Telverson Justice having asked the opinions of all the Judges in Serjeants Inne Fleetstreet, related their opinions in the Court, the Record of *Nisi prius* was returned into the Exchequer, to wit, that it was in the discretion of the Justices of Assize to accept such a Plea as is before, and that it might be



be well allowed, as the 10 H. 7. is, and it shall stay the Verdict. But otherwise it is of a protection, for although they allow a protection, yet the Judges may take the Verdict, *de bene esse*; yet he said that in the 7. E. 3. in a *Precipe quid reddat*, a Release was pleaded at the tryal, and the Jury found the Verdict, but that was the indiscretion of the Judges to allow it, when it should not have been allowed. And all the said Judges held as he related, that the Plaintiffe could not have a replication to that Plea at the tryall; for the Justices have no power either to accept a Replication upon that Plea, or to try it, but onely to return it as parcell of the Record of *Nisi prius*. And they held also that the Plea being put in the Countrey, could not be amended in adding the Town in certain in which the Close did lye; for it was matter of substance. And that the Court of Exchequer where the Record was, would not award the *Venire Facias* of all the three Villages named in the Record, if it did not appear judicially to them that the Close did extend in all the Villages; and it doth not appear for parcell, if the premises doth not necessarily extend to all the Villages, but may well be, and so presumed in one Village onely, and therefore it is matter of substance. And the Judges had not power after their Commission determined to amend the Plea.

Where words in  
a Declaration  
shall be voyd,  
rather then the  
Declaration shall  
be voyd.

**D***avis* versus *Pardy*, Mich. 8. *Jacobi*. The Plaintiffe declared of a Lease made by one *Cristmas* the sixth of *May*, Anno 7. of one Messuage, &c. In *D.* by reason whereof the Plaintiffe entered; and was possessed, untill the Defendant afterwards, to wit, 18. of the same month, Anno sexto *supradicto*, did eject him. And not guilty being pleaded, a verdict was found against the Plaintiffe. And *Telverton* moved in Arrest of Judgement to save Costs, that the Declaration was insufficient. For that Action was grounded upon two things: first, upon the Lease: secondly, upon the Ejectment, and both those ought to concur one after the other. And in this case the Ejectment is supposed to be one year before the Lease made, for the Lease is made Anno 7. and the Ejectment supposed to be done Anno 7. 6. And therefore the Declaration naught. And *Telverton* vouched the case between *Poyre* and *Hawkins*, Anno septimo, Termino Pasch. Where the Plaintiffe declared upon the Lease of *Edw. Erwer*, 27. April, Anno sexto, and laid the Ejectment to be 26. April, Anno 6. And the Court held then, that the Declaration was naught, yet in the case in question, the Declaration was adjudged good. And the word sexto to be void, for the day of the Ejectment being the 18. of the same month of *May*, it cannot be intended but to be the same year, in which the Lease is supposed to be made, by the opinion of the whole Court.



**A**ylet versus Chippin, Mich. 8. Jacobi. The Plaintiffe declares upon a Lease made by John Aylet, for one year, of certain Land in *C.* in the County of *E.* by vertue whereof he entred, and was possessed, untill the Defendant did eject him. The Defendant pleads that the Copihold Land is parcell of the Mannor of *D. &c.* of which one *Jo: Aylet* the Lessors Father was seised in Fee, according to the Custom, and that he made a surrendor thereof to the use of his Will, and by his will devised the Land in question to *John* the lessor, and *H. Aylet* his sons, and to their Heirs Males of their Bodies, and willed that they should not enter untill their severall ages of 21 years. And further willed that *W. B.* and *H. B.* his Executors should have the Lands to perform his Will, untill his said Sons *Jo:* and *H.* came to their severall Ages, of one and twenty years, &c. To which Plea the Plaintiffe replies, and confesses the Will, but shews further how that such a day and year before the Lease, *Jo:* his Lessor attained to his full Age of one and twenty years, and entred, and made a Lease thereof to him, &c. To which Plea the Defendant demurred, and adjudged for the Plaintiffe. For although the Estate to *Jo:* and *H.* precede in words, and the devise to the Executors insues in construction, yet the estate to *Jo:* Executors, precedes in possession. And is as if he should have demised the Land, untill his Sons *Jo:* and *H.* should attain to their severall Ages of one and twenty years. And afterwards to them and their Heirs Males, &c. to be enjoyed in possession at ther severall Ages, so that the Executors have onely a limited estate, determinable in time, when either Son severally should attain to his full age, for his part. For so it appears, the Devisors intent was that either Son might enter, when he attained to the age of one and twenty years. And although it was objected by Justice *Williams*, that the two Brothers are joyntenants by the Will, and if one should enter when he comes to his full Age, the other Brother being under age, that would destroy the intent of the devise, for then they should not take joyntly, but the Court as to that said, that the entry of him that attained to his full age, doth not destroy the juncture, but that they are joyntenants notwithstanding. For that entry in the intent of the Devisor, was only as to the taking of the the profits, and the possession, and not as to the estate in joyntenancy, and this is proved by 30 H. 6. Devise 12. where a devise was to foure in Fee, and that one of them should have all during his life, and this was adjudged good, and it was as to the taking of the profits onely, which observe by the whole Court but *Williams*.

**R**ice versus Harniston Pasch. 10. Jacobi. The Plaintiffe declares of a Lease made by *Jo. Bull, &c.* The Defendant pleads that she Land

Land is Copihold Land, parcel of the Mannor of, &c. Whereof the King was seised, and is seised, and that the King by his Steward such a day granted the Land in question to him in Fee, to hold at will according to the custome of the Mannor, by vertue whereof he was admitted, and entred, and was seised untill the lessor entred upon him, and outed him, and made a Lease to the Plaintiffe, and then he ehtred, and did eject him, &c. The Plaintiffe replies, that long before the King had any thing in the Mannor, Queen *Eliz.* was thereof seised in Fee in right of her Crown, and before the Ejectment supposed by the Defendant, by her Steward at such a Court did grant the Land in question, by Copy to him in Fee, to hold at Will according to the custome of the Mannor, who was admitted, and entred, and further shewed the descent of the Mannor to the King, and how the Lesser entred, and made a Lease to the Plaintiffe, who entred, and was thereof possessed, untill the Defendant did eject him. Upon which Plea the Defendant did demurr, because he supposed that the Plaintiffe ought to traverse the grant alledged by the copy of the Defendant in his Barr. But the Court held the replication good; for the Plaintiffe had confessed, and avoided the Defendant by a former Copy granted by Queen *Eliz.* under whom the King that now is claimed, and so the Plaintiffe need not traverse the grant to the Defendant, but such a traverse would make the Plea vicious, for which see *Hilliams Case*, 6. Rep. And 14 H. 8. *Dorhams Case*, 2 E. 6. *Dyer*. And *Brooke* title confesse, and avoid, for as no man can have a Lease for years without assignement, no more can a man have a Copy without grant made in Court. Which observe.

**S***Hecomb versus Hawkins*, Page. 10 *Jacobi*. The case was in an especial verdict in Ejectment, that one Mrs. *Luttrell* Tenant in fee of the Mannor of *L.* leavied a Fine to the use of her self for life, and after death to the use of her eldest Son in tayl, &c. With power to her self at any time, to make Leases for one and twenty years, and before the Lease in being expired, she made another Lease to *B.* for one and twenty years to commence after the determination of the first Lease. And as to the third part of the Land she made a Lease of that for one and twenty years after the death of one *Carn*, who in truth never had any estate in the Land, and afterwards she dyes, the first Lease expires, And *I:* the Son enters, and makes a Lease to the Plaintiffe, And the Defendant claims under *B.* the Lessee, And adjudged for the Plaintiffe, for by such a power she could not make a Lease to comence at a day to come, but it ought to be a Lease in possession, and not in interest to comence in future nor in reversion, after another estate ended, but the Law will judge upon the generall power to make Leases without saying such ought to be Leases in

in Possession, for if upon such power she might make Lease upon Lease she might by infinite Leases detain those in Reversion or Remainder out of the Possession for ever, which is against the intent of the parties, and against reason, and adjudged accordingly: *Trin. 30 Eliz. Earle of Sussex case, 6 Rep. 33.* And Justice *Williams* said, that when he was a Serjeant, it was so adjudged in the Common Pleas in the Earle of *Essex* Case, and Judgement by the the whole Court.

**B***Rasier* versus *Beal*, *Trin. 10. Jacobi.* Upon an especial Verdict in Ejectment, the Case was, that a Copy-holder in Fee of the Manour of *B.* in the County of *Oxford*, by license of the Lord lease the Land in question for sixty years to *M.* if he should live so long, rendering Rent with a Condition of re-entry, the Copy holder surrenders to the Lessor of the Plaintiff in Fee, who demands the Rent upon the Land, which being not paid he entred, and made a Lease to the Plaintiff, & without any Argument the Court seemed to be of opinion that the Entry of the Lessor was not congeable, for Copy-hold land is not within the Statute of 32 *H.8.* of Conditions, nor the Lessor such an Assignee that the Statute intends, for at the Common Law a Copy-holders Estate is but an Estate at will, & custome hath onely fixed his Estate to continue, which Custome goes not to such collateral things, as Entries upon Condition, for such an Assignee of a Copy-holder being onely in by Custome is not privy to the Lease made by the first Copy-holder, nor onely by him, but may plead his Estate immediately under the Lord, by the opinion of the whole Court.

**O***Dingfall* versus *Jackson*, *Mich. 10. Jac.* In Ejectment the Declaration was, that the Defendants *intraverunt*, and that he did eject, expulse, and amove in the singular number, and after a Verdict for the Plaintiff upon Not guilty pleaded, the Defendant shewed this matter to the Court in Arrest of Judgement, for the Declaration is incertain in that point, because it cannot be known which of the Defendants did eject the Plaintiff; for by his own shewing it appears that the Ejectment was but against one, and upon that Declaration the Jury could not finde all the Defendants guilty, for by the Plaintiffs supposal one onely did eject him, but the Court gave Judgement for the Plaintiff, that the Declaration should be amended in that point, for it was but the Clerks fault, and so it was, and upon an Evidence in an Ejectment by the Lessees of *Cresset* and *Smith*: *Telverton* said, that if a man comes into a Copy-hold tertiously, and is admitted by the Lord, and afterwards he makes a Lease for three Lives, which is a Forfeiture of his Estate, yet if he that hath the pure Right to the Copy-hold release to the wrong-doer, that it is good; for untill the Lord enter he is Tenant in fait, and if the rever as Copy-holder, 4 *Rep. 15.* But  
*Walter*

Walter seemed of another opinion, and therefore *quære* what benefit he shall have by the Release.

In an Ejectment the Plaintiff declared of an Ejectment of *decem acris pifar.* and upon the general Issue it was found for the Plaintiff, and it was moved in Arrest of Judgement, because the Plaintiff had declared *de decem acris pifar.* which is not good, for Pease are not known by the Acre, and therefore he should have declared *de decem acris tene pisis seminariis,* as if a man will demand Land covered with water, he must say, *decem acrus terre aqua coopertas,* but the whole Court held it good, for in a common acceptance ten Acres of Pease, or ten Acres sowed with Pease is all one, and so is the opinion of *Catesby*, 11 E. 4. 1. And the man the Secondary said, that so it had been adjudged in the Exchequer Chamber upon a Writ of Error.

Nonage shall  
be tryed where  
it is alleadged,  
and not where  
the Land lyes.

**M**Eerton versus Orib, Trin. 11. Jacobi, Orib brought an Ejectment against Meerton in the Common Pleas, 6 Jacobi, of a Colmine in *Durham* in the County Palatine there; the Defendant pleaded not guilty, and it was found for the Plaintiff before the Justices *Itinerantes* there, upon which Judgement the Defendant brought a Writ of Error, and assigned for Errour, that the Plaintiff appeared by an Attourney, whereas it ought to have been by Guardian, being under age: And upon an Issue that he was of full age was tryed at *Durham*, and found that he was within age; but the Plaintiff had license to discontinue his Writ of Errour, and brought a new Writ of Errour, *Quod coram nobis residat:* And declared that *M.* was inhabiting at *Westminster* in the County of *Middlesex;* and being within age, appeared by an Attorney; the Defendant in the Writ of Errour confessed that he was inhabiting at *Westminster*, but that he was at full age at the time: And upon the tryall in *Middlesex*, it was found that *M.* was under age: And it was alleadged in Arrest of Judgement, and it depended a long time that it was a mistryall; and the doubt and question was onely, whether the tryall at *Westminster* in this Case was good: And *Davenport*, and *Yelverton* were of opinion that it was not good, for the Errour assigned was done at *Durham*, and because they there have the best notice of it, it ought to have been there tryed: As if Errour be in a Record, it shall be tryed where the Record is, 19 H. 6. 79.

Secondly, This is a reall Action, in which the Land shall be recovered, and therefore though the Issue be upon a collaterall matter, yet it shall be tryed where the Land lyes, because it concerns the realty, but if it had concerned the person onely, it had been otherwise; and this difference is taken by *Montham*, 19 H. 6. 10. And therefore if a Feoffment be made upon payment, &c. If upon an Assise brought, the Defendant plead payment in another place, yet it shall be tryed where



where the Land lyes: And so likewise if the Issue should be, which is the eldest Son, although they alleadge their births in severall Counties, yet it shall be tryed where the Land lyes; and so in that Case a Release of all his right was pleaded against him, and he pleaded that he was within age, and borne in another County, yet it shall be tryed where the Land lyes, and so adjudged, 7 H. 4. 8. and 17 E. 3. 36. b. 19 H. 6. 15. Nay though the Espousals be alleadged to be in another County, yet it shall be tryed where the Land lyes, and adjudged, 7 H. 4. 8. And Davenport inferrs from 36 H. 6. 9. A grand Cape against one, he comes and pleads that he was within age at the time of the first Cape, which shall be tryed where the Land lyes: And another exception was taken, because the *Venire facias* was not well awarded, for it was directed to the Sheriff of *Middlesex*, that he should cause to come twelve, *Coram nobis apud westmonasterium*, which is not good, for that Court follows the King, and may be removed to any place, and therefore it ought to have been *Ubique fuerimus in Anglia*, but all the Judges, *Fleming* being absent, after mature deliberation held the tryall at *Middlesex* good, for they took this difference in their answer to the rule layd downe, that what concernes the realty, it shall be tryed where the Land lyes, for when nonage or the birth are alleadged to intitle one to the Land demanded, as if in an Assise the Tenant pleads a discontinuance, the Demandant sayes he was within age at the time; or to debarr another of Land, that he was borne before marriage in these Cases, because the Inheritance of the Land depends upon it, although they be alleadged in another place, yet they shall be tryed where the Land lyes, 19 H. 6. And so it is 39 H. 6. 49. b. to be intended, but if nonage or birth be pleaded as matter *dehors*, and not to the disabling of the title to the Land, but to another purpose, as here it is to the person, because he could not appeare by Attorney, in this Case it shall be tryed where the Infancy is alleadged: As if in a *Formedon* in the Remainder, the Tenant pleads nonage in the Plaintiff, and prayes that the Plea may stay untill his full age, if Issue be taken upon it, it shall be tryed in the place where it is alleadged.

And as to the Exception to the *Venire facias* the Roll is right, which warrants the Writ, and therefore they held it was but the Writers fault, and should be amended: and *Doddridge* and *Cook* held the Triall good: if Infancy be alleadged, the Triall shall be by inspection during his Nonage, as it is 17 E. 3. Account, 121. and 11 H. 4. 115. 25. Ass. 2. and 48 E. 3. 11. and the 11. Rep. f. 30. but if his Age upon inspection remains doubtfull, then the Judges may swear the party and examine Witnesses. And 25 E. 3. 44. and 50 E. 3. 5. but if the Infant come to full Age, it shall be tryed by the Countrey, 33 H. 8. and they took this Difference in what place it should be tried, for



for if the Action be real, it shall be tried where the Land lies, as it is 21 E.3.28. 28 E.3.17. 44 Affis.10. 46 E. 3.7.13 H.4.3. and if both places be in one County, then the *venire facias* shall be of both, 22 E.3.11. H. 4. 75. but if nonage be alledged in a personall Action, the Triall shall be where the writ is brought, 43. H. 6. 40. in Debt the Defendant pleaded infancy, and that he was born in such a place, yet the *Venire facias* was awarded of that place where the Action was brought, and 43 H.6.40. *Prisot* was of the same opinion, and the Law is the same, when it concerns the person as in *misnomer*, or that he is not the same person, and so in the Case in question, although the Action be brought in one place, and the nonage pleaded in another County, yet it shall be tried where the Action was brought, and therefore the Action being brought in *Midd.* the trial of *Midd.* is good, for a writ of Error, is of the nature of an Originall which is personall, and they held the *Venire facias* should be amended, being but a matter of Form, and that it was no mistriall, it being awarded at a right place, and likewise the will is right which warrants it, and therefore it is but a misprision, and no mistriall, and the *Venire facias* shall be amended according to the will, and Judgement was given for the Plaintiff in the writ of Error.



### Formedon.

*Essoin lies in a writ brought by Journe account, although he was essoined upon the first writ.*

**B***Righam* versus *Godwin*, The *Formedon* did abate, by the death of one of the Demandants, and upon a new writ brought by *Journes* accounts, the Tenant was *Essoined*, and it was moved by the demanded, that the *Essoin* should be quashed, because the Tenant was *Essoined* upon the first writ, but the *Essoin* was allowed by the Court, but it was held by the Court, that if the Tenant had the view upon the first Writ, he should never have the view again, at the Common Law we might have had a new *Essoin* upon view, as often as he brings a new writ, and *Husband* held, that if by the Common Law it is to be granted, the Statute doth not abridge it, two views do not ly upon one writ at the common Law, and if this shall be accounted but one Writ, the view lieth not, but in this case the Tenant did relinquish the view, because he had day to plead.

**N***Evill* versus *Nevil*, *Mich. 15 Jac. rotulo 77. Formedon in le Descender*, the writ was generall, and the Count was upon a Feofment made after the Statute of uses, and a speciall verdict, whether the

the Deed warrant the Count, the verdict, is whether upon the whole matter the said *A. N.* gave the moiety of the third part of the Manor, &c. for default of Issue of the Bodies of either the said *G.* and *D.* to the use of either of them surviving, and of the Heires males of his Body to be begotten or no, the Jury are wholly ignorant, the writ was to the use of *G.* and *D.* and of the Heirs males of the Bodies of the said *G.* and *D.* lawfully to be begotten, and for default of such issue male of the Body of either of them, then to the use of either of them, having issue male of his Body lawfully begotten, and for default of such issue male of both the Bodies of the said *G.* & *D.* or either of them lawfully to be begotten, then to the use, &c. By Deed an implication cannot be intended, if there be not apt words, otherwise, it is in a Will, for this is but a gift to a man and his Issue, for this gift is but to both of them for life, and severall inheritances.

By Deed an implication be intended.

**B**ishop & al. versus Cossen, Trin. 16 Jac. rotulo 62. In *Formedon*, the Tenant pleaded a warranty, and pretends that it was collaterall warranty, where in truth it was a lineall warranty, and it was held naught, because the warranty was in Law a lineall warranty; the Case was, that Land was given by Feoffment made to the use of the Feoffer, for life, remainder in Tail, Tenant for life dies, Tenant in Tail had Issue a Son and two Daughters, and the Father and Son joyn in a Feoffment with warranty, and after the Father and Son die without issue, and the Daughters bring a *Formedon*, and this is a lineall warranty.

**P**lt versus Staple, Trin 14 Jac. rotulo 112. *Formedon in le discender* against three which plead non-Tenure, and issue thereupon joyned, and found specially, that two of them were Lessees for life, the remainder to the third person, and whether the three were Tenants as is supposed by the writ, was the question, and the better opinion was, that it was found for the Demandant, for the Tenants should have pleaded severall Tenancy, and then the Demandant might maintain his writ, but by this generall non-Tenure, if any be Tenant it is sufficient, but in some Cases, the *Precipe* may be brought against one who is not Tenant, as a morgagor or morgagee.

**C**omes Leicester versus Comit. Clanriccard. In *Formedon* upon a Judgement given in part for the Demandant, and part for the Tenant, the Tenant brought a writ of Error, and had a *Supersedeas* upon it, and afterwards the Demandant prosecuted a writ of *Seisin*, and delivered it to the Sheriff, and he executed the writ, and immediately afterwards, the Tenant delivered the *Supersedeas* to the Sheriff, and the Tenant moved the Court, and prayed a writ of restitution,

tion, and it was granted him, because the Tenant had done his indeavour, and had not delayed the prosecuting the writ of Error.

Nota.

**C**omes *Clanriccard & Francisca uxor. Ejus Demandants, versus R.S. milit. vicecomit. Lyple* for three messuages, &c. which *R.* late Earl of *Essex*, and *Frances* late wife of the said Earl, by Fine in the Court of the Lady *Elizabeth*, late Queen of *England*, before her then Justices at *Westminster*, levied and gave to *William Gerrard* Esquire, and *F. Mills* Gentleman, and the Heires of the said *W.* for ever, to the use of *Elizabeth Sydney*, Daughter and Heir of *P. S. Milir.* and the Heirs of the Body of the said *E.* comming, and for default of such issue, to the use of the said *F.* then wife of the said Earl, and the heirs of the said *Fr.* and which after the death of the said *Eliz.* ought to revert to the said *Fr.* by form of the gift afore-said, and by force of the Statute in such case provided, because the said *Eliz.* died without Heir of her Body. The Tenant pleaded in abatement of the writ, because the writ ought to revert to the woman alone, and it should have been to the Husband and wife, and upon a demurrer, Judgement was, that he should answer over, the writ may be either to revert to the Husband and wife, or to the wife alone, and herein the Tenant vouch two vouches, and one is Essoined, and an *idem dies* given to the other, and Serjeant *Harris* demanded of the Court if he should Fourcher by Essoin, because the Statute of *Westminster*, the first is, that Tenants, Parceners, or Joint Tenants, shall not fourcher in Essoin, therefore they two should not fourcher by Essoin, but the Court held, that before appearance it could not appear to the Court, whether they were Tenants or not, and therefore before appearance they shall have severall Essoins, and *Westminster*, the first is expounded by *Gloucester* the tenth, which is, that two Tenants shall not fourcher after appearance: and at the day of the adjournment of the last Essoin, the Tenant was Essoined, and such Essoin was allowed and adjudged by the whole Court, and the reason hereof seemed to some to be, because the Tenant might be informed of the Vouchee, that he vouched was the same person or no, for he might be onother person, for if he should be an estranger, and demand the place, and the Demandant could not hold him to the warranty, the Demandant should loose his Land, and they held that upon severall Processe, to wit upon the view and upon the summons to warranty, which are divers Processe, the Tenant ought to be Essoined, and the Court held that this Essoin was at the Common Law, if the Tenant and the vouchee at the day given to the Tenant, and the vouchee make default, Judgement shall be given against the Tenant, to wit a petty *Cape*, and nothing against the vouchee.

*Shotwell*

**S**Hotwell versus Corderoy, In *Formedon* the Tenant prays in aid, and the prayee in aid and Tenant vouch, and the Vouchee was es-  
soined and adjourned, and at that Day the Attorney of the Tenant,  
without the Prayer in aid cast an Essoin; and an *Idem dies* given the  
Prayee in aid, and it was quashed; for they shall not have severall  
Essoines but joynt Essoines.

A *Formedon* brought of Lands in *A. B. & C.* The Tenant pleads a  
Fine of all by the name of the Mannour and Tenements in *A. & B.*  
And it was objected that he said nothing to the Land in *C.* but the  
Courtheld that by the name of the Mannor the Land in all the Villa-  
ges would pass: and the Demandant may if he will plead as to the  
Land in *C.* that it was not comprised in the Fine.

By the Name  
of a Mannour  
the Land in all  
the Villages  
will pass.

*Hill. 7. Jacobi, rotulo 76. vel 69. Formedon in the Descender* the  
Writ was general that *J. L.* gave to *T. L.* and the Heirs Males of his  
Body, upon the Body of *D. V.* Widow lawfully to be begotten,  
which *D.* the said *T.* afterwards took to Wife, and which after the  
Death of the said *T. &c.* Son and Heir Male of the Body of the said  
*T.* upon the Body of the said *D.* lawfully begotten to the said *J. L.*  
younger Son and Heir of the said *J. L.* Son of the said *T.* ought to  
descend by form of the Gift aforesaid, &c. and whereof he saith, that  
the said *T.* was seised, &c. and 2 *Eliz.* of the said Tenements did in-  
feoff the Plaintiff in Fee to the use of the said *T. L.* and his Heirs, &c.  
and note, in the Count no mention made of the Marriage.

Nota.

If a Gift be made in tail to *D.* and his Heirs Males: the Remainder  
to *A.* in tail, *D.* discontinues in the Life of *A.* and *D.* dies without  
Issue, and the Heir of *A.* brought his Writ, as the immediate Gift to  
*A.* his Ancestor, who never was seised in his Life, and for that cause  
the Writ was naught; but if *A.* had been seised of the Land, then it  
had not been necessary to have shewed the first Gift to *D.* by the  
opinion of the whole Court.



*Actions upon the Statute of Hue and Cry.*

**N**eedham versus Inhabitant. *Hundredi de Stoak, Trin. 8. Jac.*  
*rotulo 534.* Action brought upon the Statute of Hue and  
Cry by the Servant who was robbed in his own name, and  
part of the Goods were his Masters, and part his own proper Goods,  
and found guilty as to his own Goods, and a special Verdict, as to the  
Goods of his Master; and Judgement for the Plaintiff.

Action brought  
by the Servant  
in his own  
name, part of  
the Goods be-  
ing his Ma-  
sters.

Nota.

**C**onstable versus Inhabitant. in dimid. Hundred. de Waltham in Comitatu Essex, Trin. 15. Jacobi, rotulo 2244. The Action was brought for a Robbery, the Defendant is found guilty, and it was alledged in Arrest of Judgement, that the Action would not lie, because it was not brought against the whole Hundred: and it was answered on the Plaintiffs behalf, that the half Hundred is a Hundred by it self; and the Court held, the Writ should have been brought against them in this manner, *Inhabitantes in Hundredo de W.* called the half Hundred of *Waltham*; but the Writ was held good; for the Writ is, & so shall be intended to be brought against the men inhabiting in the half hundred of *W.* & Judgement for the Plaintiff; & in a special verdict, the Jury found that the robbery was done upon the Sunday, and it was held in the Kings Bench, that the Hundred was liable.

Nota.

**N**orris versus Inhabitantes in Hundredo de G. Hill. 14. Jacobi, rotulo 431. And the Plaintiff declares upon a Robbery done the ninth day of October, An. 13 Jacobi. And the Original bears Teste the ninth of October 14 Jacobi, and after a Verdict, Serjeant *Harevey* moved to stay the Judgement, because the Writ was not brought within one year after the Robbery done, according to the forme of the Statute of 27 Eliz. And the Court held it a good Exception.

The Record of  
Nisi prius a-  
mended u. on  
motion.

**C**amblyn versus Hundredum de Tendring, Trin. 15. Jacobi, rotulo 1952. The Plaintiff in his Declaration had mistaken to alledge the very Day of the Robbery, for he shewed the Robbery to be committed in October, where in truth it was committed in September; and the Court was moved, that the Record which was taken out for Trial, but never put in, might be amended, for the notice given to the Hundred, as the Record is, would appear to be before the Robbery, and they granted that it should be amended.



#### Actions in Partition.

The Process in  
Partition.

**T**he Process in Partition are Summons, Attachment, and Distress, and the Process are returnable from fifteen Dayes to fifteen Dayes; and if the Writ be brought against two or more, several Effoines will lie, but no View; and the Sheriff upon the Distress is compellable to return the value of the Land from the teste of the Original untill the Return thereof: and if the Writ be against two or more Defendants, and onely one appears, the Plaintiff cannot declare



declare against him, untill the residue of the Defendants appear : and Partition lies by the Statute of 31 H.8.cap. 32. between Jointtenants, Tenants in Common, Tenants for Life or for years, but at the Common Law Partition was onely between Coparceners, his Petit. is no Plea in Partition, and in this Action there are two Judgements, the first is, that Partition shall be made, and if the Plaintiff die after the first Jugement, and before the second Judgement, the Writ shall not abate, but his Heir shall have a *Scire facias* against the Defendants, to shew cause why Partition should be made, and a Writ of Partition will not lie of the View of Frank Pledges ; and the Death of one of the Defendants abates the Writ. And note, the Plaintiff may have a general Writ, but a special Count : and if the Defendant confess part, and plead *Quod non tenet insimul & pro indiviso*, for the residue the Plaintiff may have Judgement upon the Confession, and a Writ to make Partition upon the Confession before the Triall, and afterwards try the Issue for the residue, or else he may respit his Judgement upon the Confession untill the Issue be tried, but this is dangerous ; for if the Plaintiff be non-suit at the Assise, then the whole Writ will abate : and if the Sheriff return the Tenant summoned, when in truth he was not, an Action of Deceit lies not, but an Action upon the Case, because the Plaintiff shall not recover the Land by default, and you shall never have a Writ of Partition against one, where he cannot have one against the other ; thirteen men joyn in a purchase of a Mannour, the Conveyance was of the moiety to one of them in Fee, and the other moiety to the other twelve men in Fee, the twelve make a Feoffment to one, of twelve several Tenements, and Land, and that Feoffee makes twelve several Feoffments to those twelve men, now the thirteenth man which had the other moiety bringeth one Writt of Partition against them all, pretending that they held *insimul & pro indiviso*, and by the opinion of the whole Court it would not lie, but he ought to have brought several Writs, and *Mich.6. Jacobi.* in Partition, because both of them are in Possession, he that is not prohibited may cut down all the Trees and no Estreptment will lie.

**Clocks versus Combstoks:** The Plaintiff declares that one *A.* was Seised in Fee, and demised for years to *J.* and *L.* and to the Plaintiff for term of Life : and one of them demised to one of the Defendants for years ; the Defendant as to part pleads, that he did not demise ; and the other pleads *Non est informat.* and a Demurrer to the Plea of *Non demisit*, because it is but argumentative, *Quod non tenet insimul*, and it was adjudged a naughty Plea, a Writ of Error lies in Partition upon the first Judgement, before the Writ be returned.

*Error in Partition upon the first Judgement.*

*Mill.*

Defendant  
pleads he had  
brought a Writ  
for the same  
land, and ad-  
judged no plea.

**M**ill versus *Glembam*. The Defendant pleads, that he before the purchasing of this Writ, had brought a Writ of partition for the same Land against the Plaintiff, which yet depends, and demands Judgment if the Plaintiffs Writ were brought. And the Court held, that the Writ last brought is well brought; for if the first Plaintiff will not proceed upon his Writ, and the Defendant shall confess the Action, yet the Defendant cannot sue a Writ to make partition upon that Plaintiffs Writ, and therefore it is reasonable that the Defendant in the first Action may sue out a Writ to make partition, and that the Defendants plea is naught, and the last Writ is well prosecuted.



*Actions upon Quare Impedit.*

Process in a  
Quare Impedit.

**T**He Process in this Action, are Summons, Attachment, and Distress, peremptory by the Statute of *Marlborough*, cap. 13. the Sheriff must summon the Defendant by good summoners, and return their names upon the original Writ, and not return common summoners, as *John Doo*, and *Richard Roo*; for a Writ of deceit lyeth in this Writ, if the summons were not made indeed; The Writs hereupon are returned from 15. days to 15. days. The summons upon the first Writ may either be made at the Church door to the person of the Defendant. And although a *nihil* be returned upon the first summons, Attachment, and Distress; yet if the Defendant make default upon the Distress, a Writ shall goe to the Bishop upon the title made by the Plaintiff: but at the common Law a Distress *infinite* did lie, and no Writ to the Bishop before the appearance of the Defendant; but now this is taken away by the Statute of *Marlborough*, cap. 13. A Writ of *Journes* accompts lieth upon the death of the Testator, and summons and severance if one of the Plaintiffs will not sue.

The Judgment in a *Quare impedit*, is to recover the presentment, and the value of the Church for half a year, if the Plaintiff remove the Clerk: And if he do not remove the Clerk, then the value of the Church by two years, and the value shall be levied by *fisa* or *elegit*, and not by *capias ad satisfaciend.* for that no *capias* lay before the appearance upon the Original. Four things are to be enquired on in a *Quare Impedit*; the first is, whether the Church be full or no; the second is, if it be full, of whose presentment; thirdly, whether the six moneths be past from the time it became void; fourthly, the value of the Church by the year.

If a *Quare Impedit* be brought against diverse, they shall have severall

all effoins before appearance ; if the first man be effoined , it must be adjourned for 15. days , *idem dies* shall be given to the rest. And at that day another of the Defendants may be effoined for 15. days more, and an *Idem dies* given to the rest , and so of all the rest of the Defendants. And if the Defendant take not his effoin upon the summons , he may take his effoin upon the Attachment. And if the Plaintiff do not adjourn the effoin, he shall be nonsuit : And note, that the Defendants are not bound to appear after they have had their effoins untill the return of the Distress ; for an effoin is no appearance , because it may be cast by a stranger : And note, if the *Quare Impedit* be not brought against the Incumbent that is presented and admitted into the Church, at the time of purchasing the first original Writ, that Clerk shall never be removed by the Plaintiff, although he hath judgement to remove his presentation : but if a stranger be presented, hanging the Writ ; if the Plaintiff recove, he shall remove him : And therefore the surer way is to bring the Writ against the Bishop , Patron, and Incumbent, and then the Bishop shall not present by Cupps : and if the Patron be omitted in the originall, the Writ is abateable.

If the Originall writ be brought against three, one *May* appear before his companions, and Proceffe shall be continued untill Distresse be against the rest, and the Plaintiff in the mean time declare against him that appears in the *Simulcum*, and if he that appears pleads *non impedit*, the writ shall be awarded to the Bishop, but there shall be *accesset Executio*, untill the Plea between the Plaintiff, and the other Defendants be determined, and if the Bishop appear and claim nothing but as Ordinary, a writ shall issue to the same Bishop upon that Judgement, but if the Bishop makes a Title to present, & Judgement is given for the Plaintiff, then the writ shall issue to the Metropolitan of *Canterbury*, if the Church be within his Province, and so to the Metropolitan of *York*, if it be within his, and upon a Judgement by *non sum informat.* or *nihil dicit*, the writ, shall go to the Arch-Bishop, and not the Ordinary, if the writ be against him. The death of one of the Defendants, hanging the writ doth not abate the writ, nor of one of the Plaintiffs Parcenors. If the Incumbent recover, he shall recover damages, for he cannot have a Writ to the Bishop, and if a man recover in a *Quare impedit*, and die, his Heir shall not have Execution, for it is not a reall Action, and the Plaintiff ought alwayes in his Declaration to make mention of the last Incumbent, or otherwise his Writ shall abate.

The Husband alone, but in the Right of his wife, may without his wife bring a *Quare impedit*, but not an Assise, *de Durraigne* presentment, for he shall recover nothing but his presentation and dammages, and if the wife dye hanging the writ, it shall not abate, and a writ did abate because it was that he should permit him to nominate  
a fit

a fit person, where it should be to present, for an Advowson in *Wales*, the writ shall be brought in the next English County, and Judgement shall be given in his Action for the Plaintiffe, at the Assises, and deceit lyes as upon a Judgement had in this Action upon default upon every Issue issued, joyned by Jury, the Jury shall inquire of the points of the writ, and note, admission, plenarty, institution, and ability shall be tried by the Ordinaries Certificate, but if the Issue be whether the Church be empty by resignation, or whether the Patron have presented his Clerk, it shall be tried by the Countrey, and in this writ the Defeudant shall neither have his age, nor a protection, nor an Essoin, as in the Kings service to avoid the Cupps.

If the King was Plaintiff & that the defendant was not summoned by the Sheriff, nor attached, nor distrained, and the King had Judgement by default, no writ of deceit lies in an Assise of *Durraign*, Presentment of the writ be brought in *Midd.* at the Return of the writ, the Assise shall be there arraigned by the Serjeants at the Barr in French, and the Tenant shall be demanded, and if the Tenant do not appear, when he is demanded, a resummons shall be awarded, and if upon the resummons, the Tenant shall not appear, the Assise shall be taken against him by default, and if the Tenant appear, he may demand *Oyer* of the writ and the Return, and the writ shall be read to him, *in hac verba*, and the Return thereof, and the Jury shall have the view, and the Tenant may take exception, either to the writ, or to the Return thereof, if there be cause, and if there be no cause, then he may pray a day to plead, and if the Court give a day, then the Jurors that appeared, shall be discharged of their attendance, and ought to appear upon a new Proceffe to be awarded against them, the Judgement in this Assise is to recover the Presentation, dammages, and the value for half a year, and if six moneths be past, the value of the Church for two years, by the Statute of *Westminster*, Ed. 2. and six of the Jury ought to have the view of the Church, to the intent that they may put the Plaintiff into possession if he recover, and in this writ the Plaintiff shall not recover the Advowson, but the Presentation, the Proceffe in this writ is summons, resummons against the Tenant, and summons, *habeas corpus*, and distresse against the Jury, and the Proceffe shall be returned from fifteen dayes, to fieteen dayes, and no Essoin nor voucher lies after a resummons.

If the King present his Clerk, one may have an Assise against his Clerk only, and not against the King, and at Common Law none can have an Assise, but only the Tenant of the Freehold, but by the Statute, Tenant by Statute, Merchant, or *Elegit* may have an Assise, if the Incumbent hanging the writ die, and the disturber present again, that writ lyes by *Journes* account upon the first disturbance, and alwayes in a Declaration in a *Quare impedit*, you must lay a Presentati-

on in him from whom you first derive your Title, or under some from whom he claimeth, otherwise it is not good. The Bishop cannot grant a Sequestration in no Case, but where the Church is void, but if the Clerk be instituted, and inducted, no Sequestration lieth.

**C**Uppel versus Tansie, Trin. 16 Jac. rot. 3210. *Quare impedit* brought for the Church of *Bleby*, the Issue was, that there was no such Church, and the *Venire* was, *de visu de Bleby*, and the Exception was, because it was not of the Body of the Countie, but the Exception was salved, because in the Declaration it was alledged, that one died at *Bleby* aforesaid, and it was held, that every place alledged, shall be intended to be a Town, and by the user of the writ, it is presumed in Law to be a Parish, and then if there be a Parish, and a Town, if the *Venire facias* be either of the Parish or Town, it is good, and it is a good Writ to demand *Manerium de D.* with the appurtenances.

Exception taken to the *Venire*, and overruled.

Severall *Quare impedit*s may be brought against severall Defendants, as one against the Bishop, and another against the Patron and Incumbent, but if *J. S.* brings a *Quare impedit* against *A. B.* that *A. B.* cannot have a writ against the said *J. S.* if a *Quare impedit*, abates, within the six moneths the Plaintiff may bring another writ, but if the Plaintiff be non-suit within the six moneths, he cannot have a new writ, because the Defendant upon Title made, hath a writ to the Bishop, and for that cause, a new writ will not lie.

Severall *Quare impedit*s, may be brought against severall men.

**C**omber versus *Episcopum Cicester*, & al. Trin. 6 Jacobi. rotulo 11629. The issue in a *Quare impedit* was, if *S. Rose* by co-vin between him and *Comber* and *Rivers*, did resign into the hands of the said Bishop, if the King hath Title of lapse, and a resignation be made by fraud, and one admitted, this shall not take away the Kings Title, for if the Kings Title appear upon Record, then shall go out a writ for the King, but otherwise it is upon matter of Evidence, the King shall loose his presentation, as well by resignation, as by Death, where he hath Title to present by lapse, and doth not, except the resignation be by fraud, and where an avoidance is by Statute, there needeth not notice to be given to the Bishop.

Admittance of a Resignation by fraud, takes not away the Kings Title.

**L**ord Say versus *Episcopum de Peterborough*, Mich. 30 Jacobi rotulo 2601. The Imparlance and the demurrer entred, Hill. 7. Jacobi, rotulo 3458. The Case was Tenant in Tail grants the Advowson to others, to the use of himself and his wife, and the Heirs males of the Husband, and the Husband dies, and the wife survives, and the Lord Say marries the woman, and brought the *Quare impedit*, the estate is determined by the death of Tenant in Tail, and Judge-

The state is determined by the death of Tenant in Tail.



ment was given for the Bishop upon a Demurrer, in a *Quare impedit*, if any of the Defendants do barr the Plaintiff, the Action is gone.

**W** *Allop versus Murrey, Trin. 8. Jacobi, rotulo 3905.* The Church became void by resignation and a presentation upon the proviso in the Statute of 21 H. 8. for the Kings Chaplains. The Kings Chaplains might have three Benefices with license, nay he may give to them as many as he will, being of his own gift, Judgment for the Plaintiff, if the Incumbents Plea be found for him, he shall never be removed, although other Pleas be found for the Plaintiff by the whole Court, *Pasch. 9. Jacobi.* If the writ abate for Form, you shall never have a writ to the Bishop, nor where it appears that you have one Title.

A presentment  
by words, good.

**D** *ominus Rex versus Emerson. Trin. 8. Jac. rot. 1811.* The question was, where the King had Title to present to a Church by reason of wardship, and after livery : and before the King doth present under the Seal of the Court of Wards, the King doth present by his Letters patents under the great Seal of England, and the Clerk is admitted, instituted, and inducted, whether the Clerk shall be removed or no, and the Court held that he should not : and Judgment that the Plaintiff, *nihil capias per breve*, he that getteth it first by the Court of Wards or great Seal shall have it, there needeth no recitall in the grant. A common person by his letter or his word may make a presentation to a Benefice to the Bishop ; the King may present by word if the Ordinary be present ; for a presentment is but a commandement ; if the King under any Seal present, it is good : It is best to plead the King presented generally, and not to plead it by Letters Patents, for it is the worst way, and judgment was given for the Defendant : and *Mich. 10. Jacobi*, it was held by the whole Court, that a presentment under the great Seal, to a Church parcell of the Duchy of Lancaster is good, and needeth not to be under the Duchy Seal.

Nota.

**C** *Ranwell versus Lister.* The Defendant had been Parson for three years, and pleaded plenarty generally by six moneths of the presentation of one *Stiles*, a stranger to the Writ : And the Court held the Plea to be nought, because the Defendant shewed no Title in *Stiles*.

**N** *eedler versus Winton and Needham, Hill. 12. Jacobi, rotulo, 1845.* In a *Quare Impedit*, the Case was, Husband and Wife, bargain and sell Land to the King ; this is as good as a Fine being found,

if

if it was delivered to the King, but not entred of Record; if it was made and delivered, it was good: but if the King should before it be delivered, grant it out, it had been void, being not enrolled of record; for the King in consideration of the bargain and sale of the Husband and Wife before the Deed inrolled, did grant to them the Parsonage of *Horsham*: in this case the Wife is bound as strong as by Fine, and the King made the grant between the date of the deed, and before inrolment. If the Kings Clerk be once inducted, the K. cannot remove his Clerk at the common Law, before the Statute of 24. H. 8. If a *Quare Impedit* were brought against the Patron and Clerk, the Patron might confess the Action, and so prejudice the Clerk; therefore by the Statute the Clerk being inducted, he may plead that he is Parson impersoned, and so defend himself.

**G***Laswick* versus *Williams*, *Hill. 9. Jacobi, rotulo, 854.* A *Quare Impedit* brought of the Rectory of *I. Stoneley*, one of the Tellers in the Exchequer, was indebted to *Queen Eliz.* And it was found that he was seised of a Mannor, *ad quod, &c.* in fee, and sold it to the Plaintiff, who brought a writ to remove the Clerk, who was admitted by the presentation of *Stoneleys* wife, to whom a joynture was made by her Husband before he was indebted to the *Queen*: and it was pretended that the joynture was void by the Statute of and so was the opinion of the Court.

*A subsequent debt to the Qu. related to a-ward an assurance made upon good consideration.*

If one usurp upon the King, where the King hath Title, the Clerk cannot be removed, but by a *Quare Impedit*: but where the King is to present by laps, and one doth present the King during the life of the Clerk, shall remove him: but if he dye, the King hath lost his presentation; but if the Clerk resign, then is it no prejudice to the King.

*The King hath lost his presentation by the Clerks death.*

**C***omes Bed.* versus *Episcopum Exo. Trin. 14 Jacobi, rotulo, 2235.* A *Quare Impedit* brought, the Bishop and Incumbent joyn; and plead that there is another writ depending against the same Bishop only, and pleads it: and that the disturbance in this Declaration, and the disturbance in the former Declaration, are one and the same disturbance. The Plaintiff replies, that the first writ was brought for another disturbance, and traverses without that, that they are one and the same impediment, and the Defendant demurs upon that plea, and Judgment given for the Defendant, that it was a good plea in abatement; for although the presentation and the disturbance are both of them in question, yet the presentation is the main, and the presentation but as accessory.

*Defendant pleads another writ depending against the said Bishop, &c. good.*

The Bishops plea  
shall not preju-  
dice the Incum-  
beant.

**B**Irkhead versus Archiepiscopum Eborum & al. Pasch. 14. Jacobi  
Brotulo 953. A Quare Impedit brought for the Vicaridge of Leeds  
in York-shire. The Arch-Bishop claims nothing but as Ordinary, and  
pleads further, that the Church became void the first of January, An.  
12. Jacobi, and that six moneths had elapsed; by reason whereof he  
collated the 23. Decem. and Cook the Incumbent pleaded the same  
plea; the Plaintiff replied, and confessed the Avoidance the first of  
January: but he further said, that within the six moneths, to wit,  
the 20. of May, &c. he presented his Clerk, and the Arch-bishop re-  
fused to admit him: And afterwards, to wit, the 30. of May, the  
Bishop collated, and the Defendant demurred for the doubleness of  
the plea. If the Incumbent plead good matter for his presentation,  
although the Bishop plead insufficiently, that shall not prejudice the  
Clerk: And the Defendant took exception to the Plaintiffs writ, be-  
cause it bore date the 9. of May, the presentment was 29. of May,  
and the refusall of the Bishop was the said 29. of May, and he colla-  
ted the 30. of May: and so the writ was brought before the refusall  
made by the Arch-Bishop.

**D**ominus nuper Rex Jacobus versus Episcopum Rossen. & al. Hill.  
13. Jacobi rotulo, 2330. A Quare Impedit brought for the  
Church of Milton near Gravesend in Kent, and the issue was, that  
Queen Eliz. was seised of the advowson of the said Church, &c. and  
upon tryall of the issue, the Jury found it specially; by which it ap-  
peared, that the Queen had Title but at two turns, and the Bishop  
had one turn: and because it appeared to the Court, that the Queen  
had Title to that turn, therefore a writ was awarded to the Bishop  
for the King.

**W**inchcomb versus Episcopum rector. & al. Pasch. 14. Jacobi  
rotulo, 1026. The case was, that a Clerk in Salisbury, when  
the Church was full, contracted with the Patron, to give him 98. l.  
when the Church should become void, the then Incumbent being a  
very old and sickly man, and did conclude, that the Patron should  
grant the next avoidance to a Friend of his who presented him. And  
this was held to be a Simonaicall contract. The Clerk was admitted  
and continued in all his life, and died, and now the King presented.

The question was, whether the King, not taking advantage thereof  
during his life, shall have now the presentment, if he had resigned or  
made cession, and then another had been presented, and then the first  
Clerk had died, the King then had lost his turn. Hubbard and  
Winch held that the King had not lost his presentation, for he never  
was Parson, and that the King after his death shall have his turn:  
and Winchcomb cannot have it, because the Church was void when  
the

Nota.

the lease of the Mannor was made. And *Calverts* case in the Exchequer was remembred; for the Church being void, *P.* contracts simoniacally with the Patron to have the presentation, and upon this corrupt agreement he presents *R.* who was ignorant of this corrupt agreement, and yethe was removed; for he shall be punished for the offence of his Patron: the admiission upon such corrupt agreement maketh the institution and induction void.

**A** *Usten* versus *Episcopum London*, & al. Pasch. 12. Jac. rotulo, 2255. A *Quare Impedit* brought for the Church of *B.* he claimed by grant of the next avoidance from Sir *Edward Pynchion*. The Defendant pleads a Usurpation by Queen *Mary* upon a deprivation and plenarty of her Clerk by six months. The Plaintiff pleads a recovery by a *Quare Impedit* upon a *non sum informat.* by the Patron against the Queens Clerk. If the King upon usurpation present, and his Clerk be in by six moneths; if the Patron bring a *quare Impedit* against the Kings Clerk, and recover by *non sum informat.* this shall remit the Patron to his ancient right: otherwise it is, if the King do present by Title in the case of deprivation, the Patron must have six moneths after notice. And Judgment was given for the Plaintiff.

**W** *Ivel* versus *Episcopum Cestrie* & al. Pasch. 12. Iacobi rotulo, 626. Tenant in tayle and his sonne, grant an advowson, and the Father dyeth, the grant is void, and Judgment for the Plaintiff.

**W** *Indham* versus *Episcopum Norwic.* & al. Mich. 13. Jac. rotulo, 2042. A *Quare impedit.* brought that the Bishop should permit the Plaintiff to present, &c. to the Church of *A.* &c. and declares, that whereas *E. W.* Knight, was seised of the Mannor of *M.* with the appurtenances, to which the advowson of the said Church, to wit, to present to the said Church every first turn, &c. and that the Duke of *Norfolk* was seised of the advowson of the said Church, to wit, to present to the same every second turn. And that one *T. G.* was seised of the advowson of the said Church, to wit, to present to the same every third turn, &c. And an exception was taken to the Declaration, because by the writ the Plaintiff claimed the intire advowson, and by his count he claimed but the third turn: and also he did not alledge that he ought to have the first turn; but the exceptions were overruled by the Court; for when the Church is void, and it appertains to him to present; he hath the intire advowson, but otherwise it is, when there are two advowsons in one Church, for there the Court must be to the moiety of the Church, or the third part.

**T**He late King *James* against *Matthew*, *Trin. 4. Jacobi*. The King was Plaintiff in a Writ of Error against *Matthew*, upon a Judgement given in a *Quare impedit*, against the King in the Common Pleas, of the Church of *A.* and the Question was, whether a double usurpation upon the King doth so put him out of Possession, that he shall be forced to his Writ of Right, and it was adjudged in the Common Pleas against the opinion of *Anderson*, that he was put to his Writ of Right; but a Writ of Error being brought upon that Judgement in the Common Pleas, the Judgement was reversed by the opinion of *Popham*, *Telverton*, *Williams*, and *Tamfeild*; *Fennor*, being of a contrary opinion, and they alleadged two Reasons; first, because the Right of Patronage, and the Advowson it self being an Inheritance in the Crown; upon Record the Law will so protect it, that no force or wrong done by a Subject, it shall be devested out of the King, for there is a Record to intitle him, but there is no matter of Record against him, for a Presentation by a Subject is but matter in fact, the which Act although it be mixed with the judicial Act of the Bishop, to wit, Institution, yet it shall not prejudice the King, being onely grounded upon the wrong of a Subject: and the second Reason was, because no man can shew when the Usurpation upon the King should commence and begin; for it is not to be doubted, but that the King after six Moneths passed, if the Incumbent cy might have presented, for plenarty is no plea against him, and *Nullum tempus occurrit Regi*; and after that Usurpation upon the King, the Court doubted not but that the Patronage was still in the King; and *Popham* said, that a Confirmation being made by the King to such a Presentee, is good, to establish his Possession against a Recovery in a *Quare impedit* by the King afterwards, but that it should not inure to any purpose, to amend the Estate of the Usurper, for he gaines no Possession by the Presentation against the King, but the Release to him made by the King is void, as to so much as is in possession, and during the life of the first Presentee, the whole Court did not doubt but that the King might present, and then the Death of the Incumbent could not make that to be an Usurpation, which was not an Usurpation in his life, for his Death is a Determination of the first wrong, which will rather help then injure the King: and *Tamfeild* said, that so it had been resolved in the Common Pleas, 23 & 24 *Eliz.* in one *Yardleys* Case, for in that Case there was not any Induction, for which reason Judgement was not entred, but they were all of the same opinion, as the Court then was; and onely 43 *E. 3.* 14. 14 *E. 3.* and 18 *E. 3.* are against it; and *Popham* said, that a *Quare impedit* was by the Common Law, but it was onely upon a Presentment, to wit, Induction; but if the Incumbent was to be inducted, then at the Common Law a Writ of Right of Advowson onely lies.

Digby



**D**igby versus Fitzch, Trin. 14. Jacobi, rotulo. It was said, in this Case by Justice VVarburton, that the Presentment is the Possession in a *Quare impedit*, as in Rent, the receiving; and in common, the taking of the profits: and in a *Quare impedit* one ought to shew in his Title a Presentation either by himself, or one of those, under whom the Plaintiff claimes as in a Writ of Right of an Advowson, one must shew a Presentation in himself, or in his Ancestors, whose Heir he is plenarty in a *Quare impedit*, shall be tried by the Bishop, for the Church is full by Institution onely in common persons Cases, but in the Kings Case the Church is not full untill the Clerk be inducted, but whether a Church be void or not, shall be tried by the Countrey, for of Voidency the Countrey may take notice.



Actions upon Replevins.

**I**F the Cattel be distrained, the party that owes them may have a Replevin, either by Plaint, or Writ, at his pleasure, and if it be by plaint in the countrey, and the Bailiff return to the Sheriff that he cannot have the view of the Beasts to make deliverance, then the Sheriff ought to inquire of that by Inquest of office, and if it be found, that the Beast be not to be had, then he ought to award a *Withernam*, and if the Sheriff will not do it, then an Attachment shall issue against the Sheriff to the Coroners, and after that a Distresse, and if a *Withernam* be granted, and a *nil* returned upon the *Withernam*, he shall have an *alias & plures*, and so infinitely; and a second deliverance lies after a *Withernam*; and note, that sometimes a *Withernam* lies after a *Withernam*, as when the Plaintiff is non-suit, and after a Return *habend.* and that the Beasts are not to be found, & that the Beasts of the Plaintiff are taken in *Withernam*, and the Plaintiff appears, and alleges that the Defendant, had the cattel first taken, and prays Delivery.

And if the Defendant, when the Sheriffe comes to make replevin of the cattel, claims property, then at the return of that writ, another writ, *de proprietate probanda* shall issue to the Sheriff, by which writ the Sheriffe is commanded; that taking with him *custodibus placitorum*, &c. he shall enquire of the property. And if it be found that the property was to the Plaintiff, then a redeliverance shall be made the Plaintiff, and an Attachment against the Defendant, to answer for the contempt in taking, and unjustly deteyning, the cattell of the Defendant.

dant appear upon the *plures withernam*, he shall gage deliverance, presently. And if the Defendant in Court claims the property, and it be found against him, the Plaintiff shall recover the value of the cattell and his dammages. And if the Defendant plead in abatement of the writ, that the property is in the Plaintiff and one other, &c. and the Plaintiff confesse it, by which the writ shall abate by an award upon the Role, and a return *habend.* be awarded to the Defendant, yet the Plaintiff shall have a new replevin, and the return shall not be irreplegiabie; for the Statute of *Westm.* the second, doth not help a false writ, or abatement of a writ: but the Plaintiff may have a new writ from time to time, but it helps non-suits in *replevin*; for if he be non-suit, he shall not have a new *replevin*, but a writ of second deliverance. And if the Defendant upon the return *habend.* adjudged for him, cannot have the return of the Beasts, and the Sheriff returns upon the return *habend.* that the cattel first taken are dead, he may have a *Scire facias* against the pledges: and upon a *nihil* return upon that, he may have a *Scire facias* against the Sheriff, for insufficient pledges are no pledges; and the party may relinquish his *withernam*, and fall upon the pledges or the Sheriffe. And if cattell be put into a Castle or Fortres, the Sheriffe may take the power of the County to make a *replevin* upon the *plures replevin*: a *replevin* will not lye of deeds or charters concerning Land, and no return *habend.* lyes upon a justification: and if a discontinuance be after a second deliverance, the return *habend.* shall be irreplegiabie. And if the Defendant after an advowry will not gage deliverance, he shall be imprisoned for the contempt: no disclaimer lies upon a justification, but upon an advowry.

And if the *replevin* was sued by writ, and the Sheriffe return thereupon, that the cattell are not to be found, then a *withernam* shall be awarded against the Defendant: and if a *nihil* be returned, then a *capias alias & plur. withernam*, and thereupon an Exigent: and if hee do at the return of the exigent find pledges to make deliverance, and be admitted to his Fine, then the Plaintiff shall declare upon an *uncore detent.* and goe to tryall upon the right of the cause of distress: and if it be found for the Plaintiff, he shall recover his costs and dammages: And if for the Defendant he shall have a return *habend.* But if upon the return of the *Plures repleg.* the Defendant appear, then no *withernam* lies, but he must gage deliverance, or be committed: and the Plaintiff shall count against him upon an *uncore detent.* and so proceed to the rightfull taking of the distress. And if it be found for the Plaintiff if the Cattell be not delivered, he shall recover the value of the goods, and costs and dammages, if for the Defendant, costs and dammages, and a return *habend.*

Wilkins

**W***ilkins* versus *Danre Trin. 6. Jacobi, rotulo, 930.* The Defendant avowed a rent charge, granted to his Father in fee, with a clause of Distress: the Plaintiff demands *Oyer* of the deed, which was a grant of the rent to one and his heirs, to hold to him his Heirs, Executors, and Assigns to the use of the said *H.* and his Assigns during the life of a stranger: And whether it was in fee, or for life, was the question, and whether the *habendum* be contrary to the premises, or do stand with the estate: If the *habendum* had been to him and his Heirs during his own life, this had been void; but it was held otherwise for a strangers life, and no occupancy can be of a rent.

**C***happell* versus *Whitlock, Mich. 6. Jac. rotulo, 1316.* The question was upon a liberty in the deed to make Leases, provided they shall not exceed the number of three lives, or twenty and one years, and the lease was made for 80. years, if two live so long; if he make a Lease absolute, it must not be above twenty and one years, but in this case it is uncertain.

*Liberty to  
make Leases.*

**M***anning* versus *Camb, Pasch. 7. Jacobi rotulo, 341. in Replevin,* the Defendant avows damage feasant by reason of a devise made to the Advowant by will for one and twenty years, by one *Lockyer*, who was seised of the Land in fee: The Plaintiff saith, that true it is, that *Lockyer* was seised in fee of the Land in question, and by the said Will devised the Land to the said *D.* for the said years, in confidence only to the use of it, if she should remain unmarried, and afterwards, and before the taking, dyed thereof, seised *J. L.* being then Sonne and Heir of the said *Lockyer*, after whose death the Land descended to the said *J.* as Son and Heir, &c. after whose death the Legatees entred into the Land, and were thereof possessed to the use and confidence above said, the reversion belonging to the said *J. L.* And the woman took *Manning* to her Husband; by reason whereof, the said term devised by the said *L.* to the said *A.* and *J.* to the use and confidence above-said, ended the said being under the age of 14. years, to wit, of the age of two years, by reason whereof the custody of the Heir did belong to the Husband and Wife, by reason whereof they seised the Heir, and entred into the Land, and maintained their count; the Defendant confessed the Will, and the devise for years, in confidence: and further, that after the term he devised the Land to his sonne in fee, and a demurrer. The condition must go to the estate, and not to the use.

*A devise for  
years in confi-  
dence, the con-  
dition must goe  
to the estate,  
and not to the  
use.*

**C***ouper* versus *Fisher, Trin. 6. Jac. rotulo 513.* The Defendant as Administrator of *Foster*, advows for rent reserved upon a Feoffment made in fee of the Mannor, reserving rent in fee to the Feoffer,

Z

in

*The seisin of  
ren: reserved  
upon a Feof-  
ment within  
the time of li-  
mitation not to  
be traversed.*

in the name of a Fee-farm-rent, with a clause of Distress for the not paying of it, and that the rent did descend to the issue of the Feoffer. And for the rent due to the Heir, the Feoffer in his life advows the Plaintiff in his barre to the Advowry, saith; that neither the interest nor his Ancestors, nor any other whose estate the said T. hath in the rent were ever seised of the same rent within forty years then last past before the taking, &c. And a demurrer pretending that he ought to alledge seisin in the Advowry with forty years: And it was held by the whole Court that the seisin is not to be alledged being it was by deed made within the time of prescription; neither is the seisin but where the seisin is traversable, there it must be alledged, and in no other case, and the Judgment was given for the Advowant.

Nota.

*Mich. 8. Jacobi.* An Advowry was made for an amerciamment in a Court leet, and shews that he was seised of the Mannor in Fee, and that he and all, &c. have had a Court leet, and the Plaintiff traverses that he was seised of the Mannor in Fee: and the Court held. If the Defendant had a reputed Mannor, it would maintain the Advowry, though he had indeed no Mannor in truth.

*The beast of a  
stranger shall  
not be distin-  
guished for rent ex-  
cept they have  
been upon the  
land some time.*

**R***eynolds versus Oakley.* The Defendant avows for rent reserved upon a lease for life, and the Plaintiff shews that the place in which &c. did adjoyn to the close of the Plaintiff, and that the Cattell against the Plaintiffs will did escape into the other close, and that he did presently follow the Cattell; and before he could drive them out of the close, the Defendant did distrain the Plaintiffs Beasts: And whether the Distress were lawfull or not, was the question. And the Court held in this case, because the Beasts were always in the Plaintiff's possession, and in his view, the Plaintiff would not distrain the Cattell of a stranger; but if he had permitted the Beasts to have remained there by any space of time, though they had not been leuant and couchant, the Lessor might have distreyned the Beast of a stranger.

**B***lown versus Ayer, Hill. 40. Eliz. rotulo, 1610.* In a Replevin the question was upon these words, to wit, the said Abbot and Covent granted to the said R. that he and his Assigns, *Fierboot, Cartboot, and Plowboot*, sufficient by the appointment, &c. without making wast under the penalty of forfeiting the devise, whether those words make a condition or no, and by the whole Court held to be a condition, but Judgment was given for the Plaintiff for doubleness in the plea.

**B**rown versus Dunri, Hill. 15. Jac. rotulo, 1819. The Defendant made cognizance &c. as Bailiff, *M. Walker*, Widow, Administrator, &c. *R. W.* for one rent charge of 6l. granted by one *Warner* to the said *R.* and *M.* his wife for life of the Wife. And the said *R.* by the said writing granted, &c. That if it should happen the said yearly Rent to be behind, and not paid in part, or in all by the space of ten dayes next after any Feast, &c. being lawfully demanded, that then, &c. the said *Warner*, &c. ten shillings, *nomine pene*, for every default, and that then it should be lawfull to the said *W.* and *M.* and their Assigns, to enter into the premises, and distrain as well for the rent as for the *nomine pene*, and shews that the rent was behind in the life of the Husband, and that he dyed intestate, and that administration was committed to the woman, and made cognizance for the rent due at such a Feast in the life of the Husband, and being then behind, and the issue was, that the Grantor was not seised: and after a tryall diverse exceptions were taken; one was for that a demand was not alledged; another was, that the cognizance was made as Bailiffe to the Administrator, when as the woman by the survivorship should have the rent. Another was, that it is not alledged that the rent was behind by ten dayes next after the Feast, and the exceptions upon debate at diverse dayes were over-ruled. First, the demand is not necessary, for the Distress is a sufficient demand, as it was adjudged in *Jaces* case: The second was, because the cognizance as Administrator are void, idle, and superfluous: and for the ten dayes it was good, because that *predicto tempore quo*, &c. It was behind, and adjudged by the whole Court for the Advowant.

*Demand not necessary in a Replevin for rent.*

**S**Loper versus *Allen*, Trin. 15. Jac. rotulo, 3002. Replevin upon the taking of 40. Sheep; the issue was, that the Sheep were not levant and couchant, and found by a speciall verdict that twenty Sheep were levant and couchant, and that twenty Sheep were not levant and couchant: and it was held upon the reading of the Record, that the Plaintiff should have his Judgment.

*Nota.*

**B**urton versus *Cox*, Hill. 16. Jac. rotulo, 2044. The Defendant avows for a rent charge granted to him for life by his Father, issuing out of all his Lands in such a Town, to have and to hold, to levy, and yearly to take the said annuity or annuall rent of &c. during the naturall life of the said *P.* at two Feasts in the year, to wit, &c. by equall portions: the first payment to be made at the first and next Feast of the said Feasts, which should next happen after the term of 8. years ended and determined, specified and declared in the said will. And if it should happen, &c. And averres in the avowry, that there is not any term of years specified and declared in the said Testament

*Exception to the avowry too late after judgement entered.*



before recited. And note, that in the premises of the Deed it is recited thus in fulfilling the Will or Testament of me the said T. bearing date such a date I have given, &c. And the Court held that the grant was present if no term was contained in the will, and Judgment was given for the Advowant. But after Judgment was entred upon Record, an exception was taken, because it was not averred that the Grantor was dead: and it was allowed for a good exception, but it came to late judgment being entred.

Replevin not  
within the sta-  
tute of 3. Jac.

**H**eyden versus Godfelm. Judgment for the Defendant who avowed for rent reserved upon a Lease for years: and it was moved that the Plaintiff who brought the writ of Errour upon that Judgment ought to find bayle upon the writ of Errour by the Statute of 3. Jacobi, and it was held by the greater number of the Judges that the Plaintiff should not find bayle for Replevins are not within the Statute.

**T**urny versus Darnes, Trin. 17. Jac. rotulo, 2887. Demurrer in a replevin upon a traverse of Lands, when as the parties have not agreed of the quantity of Land. The Avowry was that C. was seised of one Messuage, two Barns, one Mill, &c. and 100. acres of Land, with the appurtenances in W. and held them of &c. by fealty & rent, &c. and suit of Court, &c. And the Plaintiff prayed in aide, and he joyned, and alledges that he was seised of 70. acres of Land with the appurtenances in his demesne as of Fee, and held them of G. by fealty and rent, &c. and suit of Court, and traverses that he held the Tenements of the said G. as if his Mannor of W. in manner and form as &c. and a speciall demurrer: and one cause was, because he denies not the seisin of the said services, but only denies and traverses the tenure, and therefore they pretended that the plea contained double matter, and was a negative pregnant, and secondly, whether the Seisin or Tenure be traversable, and the Plea was held good by Hubbard and Warburton.

Judgment arre-  
sted, for that  
the plea was  
naught.

**R**ichards versus Young, Trin. 16 Jacobi rotulo 104. vel 1700. A Replevin brought for taking of Cattell at Aller, in a certain place called Land Mead, the Defendant avows as Bailiff of Sir John Davies the Kings Serjeant, containing four Acres for damage feasant, the Plaintiff pleads in Barr, that Henry Tearl of Hunt. was seised of the Mannor of Aller, whereof one Messuage, &c. was parcell, and customary Land, and devisable by Copy of Court Roll, and that within the said Mannor there was a Custome that every customary Tenant of the said Messuage hath been used to have Common of Pasture in the said place called Land Mead, the Issue was with-  
out

out that, that within the said Mannour, with the appurtenances whereof, &c. is, and time out of mind, was a custome that every customary Tenant of the said Messuage &c. had Common of pasture in manner and form, &c. and Serjeant *Harris* moved in Arrest of Judgment, that there was no custome alledged, because it did not appear in the pleading, that the place where the taking was supposed to be was within the said Mannor, and no custome of the Mannor, could extend forth of the Mannor, but he ought to prescribe in the Mannor, and note he ought to have pleaded, that the place in which, &c. was parcell of the Mannor, and then the Plea had been good.

In a *Replevin* upon an Avowry for Rent, the Plaintiff for part pleadeth payment, for the other part an Accord, the one Issue is found for the Plaintiff, and the other for the Defendant, the Plaintiff shall recover his costs and damages, and the Defendant shall have Judgement of Return *habend.* and no costs and damages, I think otherwise it is, if the Avowries be severall, then on both sides they shall recover costs, and damages.

**L***ee* versus *Edwards*, *Trin.* 19 *Jacobi* rotulo, 470. The Case was in *Replevin*, a Copy-holder claims Common in another mans Land, & the Lord infeoffeth the Copy-holder of his Copy-hold Land, whether he hath now lost his Common, and held that he had, but if a Copy-holder hath Common in the Lords waste, and the Lord infeoffeth him, of the Copy hold with all Commons, the Common is not gone.

**O***abel* versus *Perrot*, *Hill.* 9 *Jacobi* rotulo 2734. Tenant in Tail hath power to make a Lease for 89 years, if three persons live so long, and reserving the old Rent due, and payable yearly, and he maketh a grant in Reversion for years, and whether that be good or no was the Question, there being a Lease for life in possession, the second Lease was for 89 years, if three live so long, for the matter in Law, the Court held the Lease good, but for want of an averment of the life of, &c. the Plea was not good.

**R***oberts* versus *Young*, *Hill.* 9 *Jacobi* rotulo 1835. the Defendant in a *Replevin* pleads that he offered amends, and doth not shew that he offered it before the impounding of the Cattle, and adjudged an ill Plea, and the offer of amends cannot be made to him that maketh cognisance.

If one inclose part, it is an Extinguishment of Common for cause of vicinage.

Avowry amended after Entry by consent.

One of the Jurors names mistaken in the Pannell of the Return, and amended upon the Sheriffs Oath, that he was the same man.

If two men distrain one Mare, and both have Judgement, no Return.

**B**acon versus Palmer. Trin. 12 Jacobi rotulo 3947. A Copy-holder in Replevin prescribes to have Common of pasture appurtenant to the Copy-hold, the other party, pleads an Extinguishment of Common, because the Lord had inclosed Land, lying in another field in which field, and in the other field, the Lord had Common by cause of vicinage, and note that in Common for cause of vicinage, if one inclose part, it is an extinguishment of all the Common.

**S**Harp versus Emerson, Mich. 12. Jacobi. The Defendant makes Savowry for Homage, Fealty and Rent, the Plaintiff prays in aid, and hath a Summons in aid, and at the return of the Summons, the Prayee in aid was Effoined, and after the Effoin, the Defendant moved the Court, that the Homage might be put out of the Avowry, which was entred with by consent of parties, was raised out of the Will.

**A**Rundell versus Blanchard and Jackson, Pasch. 13 Jacobi rotulo 2037. The taking in Replevin was supposed to be at Southwark, and one of the Defendant pleads *non cepit*, and the other Bailiff of the Governors of the possessions, revenues, and good of the Free Grammar-School of &c. for the Parishoners for the Parish of Saint Olaves, in Southwark, in the County of Surrey, and the Advowry was made for damage fesant, the Plaintiff prescribed for a way belonging to his house, in the Parish of Saint Olaves in Southwark, and the *Venire facias* was of Southwark, in the Parish of Saint Olaves in Southwark, and exception taken to that, and held good, because one Defendant had pleaded *non cepit*, and another exception was, because he had not shewed when the Corporation begun, and held an idle exception, for one need not shew when they were incorporated, another exception was, because the name of one of the Jury was mistaken, because in the Return of the *Venire* it was to *Lisney* of *Croydon*, and in the Pannell of the *Habeas Corpus*, it was written to *John Lisney* of *Croydon*, and because in found it is all one, and the Sheriff made oath, that he was the man, that was returned, in the *Venire facias* the Return was amended in Court, and Judgement given by the whole Court for the Plaintiff.

**P**ain versus Mascall. Hill. 12 Jacobi. rotulo 3400. The Lord avows the taking of one Mare, as for Rent behind, so for the fourth part of a Releif, and doth not expresse the same due for the releif, and for the Rent, the Plaintiff pleads tender, and demurres for the Releif, because he had not expressed the same, and because he had distrained one thing for the Rent, and Releif, pretending that if one cause passe

pasſe againſt him, and another for the Avowant, that he could not have a Return *habend.* but the Court were of a contrary opinion, but if two men ſhall diſtrain one and the ſame Mare for two ſeverall cauſes, and one hath Judgment for himſelfe, and the other for himſelfe. In this caſe no return *habend.* can be made of the Mare,

**B**rown verſus Goldſmith, *Trin.* 13. *Jacobi rotulo*, 607. A Court of Pipowders is incident to a Fine, and a Court Baron to a Mannor: And a Court Baron cannot be ſeparated from a Mannor; for it is a wealth to a Mannor: the like of a Court of Pipowder to a Fair by the grant of a Mannor with *cum pertinencijs* the Court paſſes; for it is an incident inſeparable to the Mannor, and a man cannot grant his Court but he may grant the profits of his Court.

Court Baron in  
order to the  
Mannor.

**M**agiſtri & ſocij Collegij Emmanuelis in Cambridg. The writ was adjudged naught in *replevin*, becauſe they had diſtrayned in their proper names for a Corporation: as Maior and Comonalty cannot diſtrain in their own perſons but by their Bayliſſ. The Court held that the Sheriff could not take a Bond in *replevin*, but muſt take pledges according to the old cuſtome.

Nota.

**J**uid verſus Bungory, *Trin.* 8. *Jac. rotulo*, 3059. The Defendant ſhews that one was ſeiſed of Land in fee, and held it by Knights ſervice of a Mannor, and for the rent of two Cocks and two Hens: and the Lord grants the third part of the Mannor to another, who avows for the ſervice, and the Cocks and Hens, and held he could not alone avow for that joynt ſervice, but the other ſhould joyn with him.

Nota.

**W**enden verſus Snigg, *Trin.* 11. *Jac. rotulo*, 1137. In *replevin* the queſtion was upon a Leaſe for life made to three, to have and to hold to them the ſaid *A. B. and C.* and every of them for the term of their lives, and the longeſt liver of them ſucceſſively one after another as they are writ in order. And the queſtion was, whether this was a remainder or no, and it was held to be a remainder upon the reading of the Record: but if the grant had been only ſucceſſively, not ſaying as they are named in the writing, it had been naught becauſe he could not tell who ſhould begin.

A leaſe for life  
to three to hold  
ſucceſſively,  
naught.

**T**horold verſus Hadden, *Trin.* 11. *Jac. rotulo*, 451. In *replevin* a Juror was returned by the name of *Payly*, and in the diſtreſs the name was *T. P.* and in the Pannell he was written *Baily*, and tryed by that name of *Baily*, and moved in arreſt of Judgment for the miſtaking of the name. And the Court held; that if the right name was ſworn, yet notwithstanding the miſtake it was good; for if the name

The pannell of  
the Habeas  
Corpus amended  
upon Oath.

in

in *venire* was not mistaken, all was good, and the Sheriff ought to amend his misprision: and the Court demanded if any one could swear that *Paly* was sworn; and one then present in Court made oath that *Paly* was sworn: and the Court ordered that it should be amended, and Judgment was given for the Plaintiff; every Leet was derived out of the Sheriff's turn.

**P***aul* versus *Barwicke*, *Hill. 11. Jac. rotulo, 2147.* A stranger in *replevin* pleaded *non est factum*, where he should have pleaded *non concessit*, and good after a verdict, though it's not formall pleading.

**R***ead* versus *How*. In *replevin* the place was omitted in the Declaration, and the Defendant demurred and held a good cause; for the Plaintiff is bound to take notice where the Cattell are distrained; a man cannot distrain for a rent charge but in the day time; because I may take notice where it is, because the Law presumeth that I or my servants are all the day upon the ground. A second deliverance must not vary in the place; a disclaimer goeth to the *locus in quo*, &c.

Nota.

**H***ynd* versus *Wainman*, & *al. Pasch. 8. Jacobi rotulo, 758.* *Wainman* pleaded *non cepit*, and the other made cognisance as Bayliff to *Wainman*. The Plaintiff pleads, that the parties to the Fine had nothing, &c. and it was tryed *Mich.* and *Jacobi*, and it was moved by the Councell of the Defendant, that the Plaintiff should prove an actual taking: but the Court held the contrary. And the Judges said, that if one takes Cattell as Bayliffe to another, and by his command, this shall be adjudged to be the taking of the Master as of a Bayliff in trespassse.

**F***rancis* versus *Forrest*, *Trin. 9. Jacobi rotulo, 2033.* In *replevin* for the taking of Cattell at *A.* in a certain place called *R.* the Defendant avows dammage fasant; the Plaintiff in his Barre saies, that he was seised of one Messuage, &c. in *C.* in the Parish of *A.* and prescribes for common: And after a tryall it was moved in Arrest of Judgment, that the *venire facias* was ill awarded because it was of *A.* only: and so it was adjudged by the Court. And *Cook* said, that at *C.* or in *C.* imply a Village, and therefore he said, the *venire facias* ought to have been of *C.* and *A.* or at least of the Parish of *A.* and *Brownlow* chief Prothonotary agreed to this.

Richardson



**R** *Ichardson* versus *Sterer*, *Trin.* 13. *Jacobi rotulo* 786. In *Replevin* the Defendant avows for Damage fasant. The Plaintiff replies that long before the time of taking the Cattell, *H.* late Earl of *L.* was seised of one Messuage, &c. and so prescribes for Common of Pasture for ten Beasts, and so justifies the putting in of one Cow of the two Cows using his Common. And the Plaintiff further saies that the said *W. R.* long before, &c. lent to the said *T. P.* the other Cow to manure the Land of the said *T. P.* as long as the said *W.* pleased; And so prescribes for the putting in of that Cow being thereof possessed by reason of the lending of it, and so demands Judgement. And *Hutton* Serjeant moved that the Barr was naught, because the Plaintiff had falsified his Replication; because the Replication is by two, and by the pleading another time of the taking the property was in *P.* only, and the speciall property by vertue of the lending was also in *P.* And so *Replevin* ought to have been brought in the name of *P.* only, and the Defendant demurred the Replication, and the Plaintiff was non suit.

**P** *Ope* versus *Shurm* *Hill.* 7 *Jacobi rotulo* 336. The Defendant avows Damage fasant. The Plaintiff claims Common by reason of a Demise made to him by one *H. W.* who was seised in Fee of one Messuage and Common for him, his Tenants and Farmers, &c. And alleges one Lease made the thirtieth of *March* 11. to have, and to hold, &c. from the Feast, &c. then last past for one year, and so from yeer to yeer, &c. The Defendant traverses the Demise, and the Jury finde that the said *H. W.* before the said time of the taking, to wit, the 25 of *March*, *Anno* 11. did demise to have for one yeer then next following, and so from yeer to yeer, and this found specially. And Judgement was given for the Plaintiff, because the matter in question was whether he had right of Common, or not, and not the title of the Lease, and it appears by the Jury that he had just right of Common. And *Warburton* put this difference, if a Tenant brings an Action of Trespasse wherefore by force of Arms, &c. against his Lord; And the Lord pleads that the Defendant holds by such services, and Issue be taken upon it; And the Jury finde that he holds by other services, the Verdict is sufficiently found for the Lord, because the Plaintiff could not maintain an Action against his Lord.

**I** *Ohnson* versus *Thorowgood* *Trin.* 12 *Jacobi rotulo* 1734. In *Replevin* the Plaintiff allows damage fasant, the Plaintiff claims Common by prescription to, when the Fields called *F.* and *C.* lye fallow all the time of the year. And when the Fields are sowed after the Corn, &c. After the Feast of *Pemecost.* they used, &c. And the Jury found that he had Common to wit, when the Feilds lye fallow every year,

all the time of the year. And when the Fields were sowed, they used to have Common, &c. And it was held by *Nicholls* that for Common Appendant it is not necessary to prescribe, but to say he is seised of one Messuage, &c. in Fee; and that he hath Common of Pasture in the said place, as belonging and appertaining to the Tenement. And saies further, that Judgment ought to be given for the Plaintiffe, because it appeared by the Record, that the Defendant took the Cattle at such time as the Plaintiffe ought to have Common. And therefore *Nicholls* said, that if a man have Common for great Cattell and Sheep, and the Sheep be taken, and he prescribes that he hath Common for Sheep only; and the Jury said Common for Sheep and great Cattel, the Common is found for the Plaintiffe. And the like if one claim Common all the time of the year, when the Land lyes fallow, and when it is sowed, from such a day unto, &c. And his Cattel are taken in the year when it is sowed as lies fallow, it is sufficient for the Plaintiffe to prescribe for Common, either in the year when it is sowed, or when it lies fallow. And if the Jury find all the Commons, it is sufficiently found for the Plaintiffe. The like if a man hath Common from such a day to such day, and the Cattell are taken, and a day between the dayes, and he prescribes that he hath Common in the said time, *quo, &c.* And the Jury find he had Common before that time the same day, and after the Verdict is found for the Plaintiffe, and *Warburton* and *Winch* of the same opinion.

**P***lus* versus *James*, Mich. 12. *Jacobi rotulo* 2155. Upon a speciall Verdict for the Misnomer of a Corporation. The first question was, whether the foundation of poore men to pray for Soules departed is within the Statute of Chaunterys: and secondly, for the Misnomer. And *Winch* held that the Plaintiffe should not be barred for the Misnomer; and for the second he held that his house was within the Statute of Chaunterys, and so the interest in the King, *H. 6.* And so the Lease made by the Master of the Hospitall void. *Dyer* 246. 287. And *Warburton* held the Plaintiffe should be barred upon both points.

Attornment not  
necessary for a  
Copy-holder.

**S***Wynerton* versus *Mills*, Hill. 14. *Jacobi rotulo* 2049. In a Replevin the Defendant avows for a rent charge reserved by a Copiholder who is seised in Fee, and made a Lease by the license of the Lord, reserving Rent at foure Feasts, or within one and twenty days, being lawfully demanded, and afterwards the Copiholder surrendred one moiety in Fee to a stranger, and afterwards surrendred the reversion of the other moiety to another, to which the Termer attorned, and so avowed for Rent. The Plaintiffe pleaded in Barr that he was seised of a Close adjoyning to the place, in which, &c. and put therein his Cattell, and that they escaped by fault of inclosure, and issue taken upon

upon that. And after a Verdict by default those exceptions were taken to the Avowry in Arrest of Judgement. First, because it appeared by the Advowry that the Copiholder had surrendered a Reversion, which could not be, because a Copiholder is a Tenant at will, and so could not have a reversion; for he cannot make a Lease for yeers without the license of the Lord, but this exception was over-ruled by the Court. Secondly, because there was no Attornment alledged in the first surrender. And it was held no exception, because the Rent for which he avowed was reserved by the Copiholder by the second surrender, to which the Termer had attorned. And also the Court said, that an Attornment is not necessary for a Copiholder, because there is no time when the Terme should attorn. For before the surrender he cannot attorn; and after the surrender and admittance it is too late. And the Copihold estate is like an estate raised by uses or devise, in which an Attornment is not necessary. As also in an estate raised by Fine, and the like, an Attornment is not necessary, for if the Termer will not attorn, he is compellable by Law, as by a *Quid juris clamat*: but a Copiholder hath no means to make the Termer attorn if he refuse. And thirdly in the conclusion of the Advowry, he doth not say that the Rent was behind such a day, and one and twenty dayes after at least; and this exception was disallowed, because the distresse is a sufficient demand of the Rent; and it appears that the day of the taking of the distresse was one and twenty dayes after the Feast, at which the Rent was due, and Judgment was given for the Advowant: and note, that a Covenant to distrain is idle, for a man may distrain of common right.

**H**owell versus Sambay, Mich. 13 Jacobi rotulo 2009. In Replevin, the Defendant avows for a Rent charge, and a *Nomine pene* granted by Tenant in tail generall, and one Fine levied afterwards, and the use expressed: the Plaintiffe replies, and saies that the Grantor had only an interest for life, and so makes inducement, and traverses the use of the Fine. The Defendant demurrs; And held by the Court that the Grantee was not seised in tail, nor to the use of the Fine. And it was said, that in this case, that it was necessary for the Advowant to plead the Fine with the estate tail; for if the Tenant in tail grant a Rent charge, and dye, no Fine being levied, and the estate tail descends, the issue in tail is not chargable with the Rent. And note, the Advowry was as well for the Rent as for the *Nomine pene*, and no speciall demand was alledged in pleading the Rent: and it was adjudged by the Court a naughty advowry as to the *Nomine pene*, but good for the Rent, as it hath been adjudged in one *Mildmayes Case*.

*Demand necessary for a Nomine pene.*

**C**osterell versus Harrington, Pasch. 6. Jacobi. rotulo 545. In a Replevin the Defendant avows for an Annuity for 20 d. granted for yeers payable upon demand, and alledges a demand; the Plaintiff demands either of the Deed, and by the Deed it appeared that for a hundred and ten pound one Rent of twenty pound was granted for eight yeers, and another for 20 l. for two yeers, if E. R. and T. should so long live: the Plaintiff pleads the Statute of Usury, and sets forth the Statute, and a speciall usurious Contract. If it had been layed to be upon a loan of Money, then it was Usury; but if it be a bargain an Annuity it is no usury. But this was alledged to be upon a lending

**V**Vood versus Moreton Hill, 6 Jacobi. rotulo 1802. In Replevin the Defendant advows to have Common Appendant out to his house and Land, the Plaintiff saith, that he had Common Appendant to his House and Land. And the Defendant to avoid the Common saith, that the Commoner sold to the Plaintiff, five Acres of the Land, to which the Common is appendant, pretending that he should not have Common for that Land, being but parcell of the Land to which the Common was appendant, Common Appurtenant cannot be to a House alone, purchasing of part of Common Appendant, doth not extinguish the Common, otherwise it is of Common Appurtenant. And it was pretended to be Common Appurtenant, because it is to a House and Land, whether by severance his Common is gone, and held to be common Appendant, and Judgment given for the Plaintiff.

Common Appurtenant and purchase part, the Common is gone, but not if Appendant.

**M**orse versus Well. Replevin for Common of Pasture, the case was that the Father was seised of two yard Land with Appurtenances, and had Common of Pasture, for four rother Beasts, three Horses, and sixty Sheep, and he demised part of the said two yard Lands in being. And whether the Common should be apportioned, and if it should be apportioned whether the Prescription failed, because the issue was taken, that he and all those, &c. had Common in the said two yard Land, A Release of Common in one Acre, is a Release of all. If I have Common Appurtenant, and purchase part, the Common is gone, but otherwise it is of Common Appendant. And note: this Common was Common Appendant, and the purchasing of Common Appendant, doth not extinguish the Common, and Judgment was given for the Commoner by the whole Court.

Nota.

**H**ughes versus Crowther, Trin. 6 Jacobi. rotulo 2220. In a Replevin a Lease for yeers made to Charles H. and the said A. T. to have and to hold from, &c. for sixty yeers if they live so long, Charles dyed,

ed, in this case Judgment was given, that the Lease was ended by the death of *Charles*, but otherwise it had been if it had been for life.

**B**icknell versus *Tucker*, Trin. 9 Jacobi rotulo 3648. in a Replevin the case was, whether a Fine with five years will bind the Copy-holder in remainder, there was a Copy-hold granted to three for lives, to have and to hold successively, the first had the Free hold granted to him, by the Lord of the Mannor. And then he leavied a Fine and five years passe, whether he in the Remainder be Barred or no, those whose estates are turned to rights, either present or future, are meant by the Statute, to be barred of a Copy-hold for years, be put out of possession, and a Fine Leavied and no entry by him, he is barred by the Statute, by the Bargain and Sale, he in the Remainder is not put out of possession, if a man make a Lease to begin at *Easter* next, and before *Easter* a Fine is leavied, and five years passe, this Fine will not barr, because at the Leavying of the Fine he could not enter, for then his right was future, if the Lease had been in possession, and the Lessee had never entered he had been barred. A Lease for years, Remainder for years, if the first man taketh for life, the first estate is not so determined but that the Remainder standeth, if a Copy-hold surrender for life, there passeth no more from him then so much as maketh the estate and no more, and the rest remaineth in him.

*Nota.*

**C**ramley versus *Kingswel*, Pasch. 15 Jacobi rotulo 710. The Defendant makes cognisance as Bailiff of *Kingswell* his Father for Rent, service due to his Father at such a Feast. And shews that *Cramley* holds of him by fealty, and rent paiaible at such a Feast, and for Rent due at such a Feast made Cognisance, the Plaintiffe in Barr saies, that he at the said Feast offered the Rent upon the Land, and that no body was there to receive it. And the Plaintiffe saith, that afterwards he demanded the Rent upon the Land, and the Plaintiffe made a Replevin, pretending the Lord should make a personall demand, but the whole Court was against him. And *Warburton* took exception against the pleading the Tender, because he saith that he offered the Rent to pay, when as he was not present. And the question was, whether the Lord for a Rent service, did not demand it at that day whether he can distrain without a demand of the person, and held he might, for the Tenant is yet bound to tender, and the Land is debter, and the Lord may resort thither, when he pleases to demand the Rent upon the Land, but if he tender his Homage, and the Lord refuses it, he cannot distrain without a demand of the Person, and Judgment for the Defendant.

*Demand of Rent service upon the Land sufficient.*



**S***Tokes* versus *Winter*, *Trin.* 15. *Jacobi rotulo* 2242. In *Replevin*, the Defendant makes cognisance as Bayliff to Tenant for life, to whom the Annuity was granted for life, to begin by will, after the death of the devisor; And alledges the death of the devisor, but not the day of the death: after whose death the said *H.* was seised of the yearly rent aforesaid in his demesn, as of his Free-hold for terme of his life, by vertue of the devise aforesaid. And because seven pounds of the Rent aforesaid, for one year, ended at the Feast, &c. and by the space of 14. dayes then next following were behinde to the said *T.* the said time, with, &c. the said *T.* as Bayliffe of the said *H.* doth make cognisance of the taking of the cattell aforesaid in the said place, in which, &c. for the said 7 li. for the yearly Rent aforesaid being so behind, &c. and issue was taken whether the said *I.* at the time of his death was seised of the said six Acres of Land in his demesne as of Fee, as, &c. And after tryall exception was taken to the Advowry, because it was not alledged that the annuity at such a Feast, after the death of the devisor was behinde, but it was over-ruled, because there is so much expressed, and Judgment given for the Defendant.

**H***umfrey* versus *Powell*, *Trin.* 12. *Jacobi rotulo* 2791. *Replevin*, wherein the Defendant avows for one Annuity granted to the Defendant, to whom the office of Catorship of the Church of *Rossen* in *Kent* was granted by the Dean and Chapter of that Church for life, with an Annuity of 6. pounds for the exercising of that Office, with a clause of distresse, by vertue of which grant he was possessed, and avows for the Annuity, and avers that it was an ancient Office pertaining to the Dean and Chapter of *Rossen*: and doth not aver that the Annuity was an ancient Annuity. The Defendant pleads the Statute of the 13 *Eliz.* that all Devises, Donations, Grants, &c. made by any Master, and Fellows of any Colledge, Dean and Chapter, &c. other then for the terme of twenty and one yeers, or three lives from the time of this Devise, &c. should be totally void. And shews that the old Dean died, and another was elected; And a Demurrer thereupon; And Judgment that the Grant was void.

**H***en* versus *Gerrard*, *Mich.* 13. *Jacobi rotulo* 752. The Defendant in *Replevin* avows, that one being seised in Fee made a Lease to him, and avows for Damage feasant. The Plaintiffe in Barr pleads, and maintains his Declaration, and traverses the Lease upon the Avowant, demurs, and adjudged a good traverse.

**I***enys* versus *Applesforth*, *Trin.* 17. *Eliz.* rotulo 543. The Defendant avows for a Rent charge, the Plaintiffe in Barr pleads that the Defendant had presented a Writ of Annuity, And that he had an *Impar-*  
lance

lance thereunto; And demands Judgement, if the Defendant did well make cognisance to the taking of the cattell in the said place, in which, &c. in name of a distresse for the rent aforesaid, by vertue of the said writing, as Bayliffe of the said R. the said Writ of Annuity being prosecuted, &c. upon the said writing, in form aforesaid, &c. And a Demurrer ther upon, and Judgement by the whole Court for the Plaintiffe; it is not needfull to lay a prescription to distrain for an Amerciament in a Court Leet, but it is otherwise for an Amerciament in a Court Baron, by the whole Court.

**D**arcy versus Langton. The Defendant avows for a Rent charge, and for a *Nomine penæ*, and no mention made in the Avowry of the Rent charge, and the Plaintiffe was non-suit, and afterwards in Arrest of Judgement, this matter was alledged, and at first held to be a good exception; but afterwards Judgement was entred, an Advowry is in the nature of a Declaration, if that be vitious no Judgement can be given for the Advowant.

**T**rin. 9. *Jacobi Regii, rotulo 2033.* Replevin for the taking of Cattell at Andover, in a certain place there called R. The Defendant makes cognisance for damage feasant: the Plaintiffe saies, that he was seised of the Messuage, &c. in C. in the Parish of A. to which he claimed Common of Pasture. And issue taken upon the prescription, and a *Venire Facias* of A. and exception taken, because it was not tryed of C. and A. or of the Parish of A. but it was adjudged to be good.

**T**rinbone versus Smith, Trin. 12. *Jacobi rotulo 626.* In Replevin, four *Nota.* and twenty were returned upon the *Venire facias*, and upon the *Habeas Corpus*, onely twenty and three were returned, and the Jury did not appear full, and a *Tales* was awarded, and tried for the Plaintiffe, and good, because the *Venire Facias* was returned full.

**P**igott versus Pigott, Mich 20 *Jacobi.* In Replevin, Avowry that Ellen Enderby was seised in Fee, of three Acres in Dale, and took to Husband S. Pigott, and had Issue Tho: Ellen dyed, and the husband was, in by the Curtesie, the Husband and Tho: the Heir, granted a Rent of 10. s. issuing out of the three Acres to the Avowant, and avows for so much behind, the Plaintiffe in barr sayes, that before Ellen had any estate, one Fisher was seised in Fee, and gave it to John E. in tayl, Ju: had issue Ellen, who after the death of her Father, entred and was seised in tayl, and took a Husband, as is before declared. And had Issue Tho: and that Tho: Tenant by the Curtesie living, grants the Rent as above without this, that Ellen was seised in Fee of three Acres, and issue was joyned thereupon, and found for the Avowant. And in arrest of

Of Judgment it was objected, that in effect there was no issue joyned. For the traverse of the seisin of *Ellen E.* was idle, for no title of the Rent is derived from her, but they ought to have traversed the seisin of *Thomas* the grantor, and then the issue had been of such a nature, that it had made an end of the matter in question, which was not in this case, no more then if the Tenant in Formulen should plead not guilty, but the Court held that though an apter issue might have been taken, and that the traverse is not good, yet it was helped by the statute of *Jeofailes*. For the estate of *Ellen H.* was in a sort by circumstance materiall. For if she were seised in tayl, and that estate tayl, descended to *Thomas* the grantor, then by his death the Rent is determined after the Fee descended to *Tho:* from *Ellen*, there the estate was of that nature, that he might grant a sufficient rent charge. And although it might well be presumed, that *Thomas* after the Fee descended to him from *Ellen* had altered such estate tayl, yet by *Polham* the Courts shal not now intend that, because the parties doubted nothing, but whether *Ellen* was seised in Fee or not when he dyed, And that doubt is resolved by the Verdict, as if a Defendant should plead a D ed, of *J. S.* to *A.* and *B.* and that it dyed, and *B.* survived and inpossed the Defendant, if the Plaintiffe should say that *J. S.* did not infeoffe *A.* and that they should be at issue upon that, and should be found against him, although this be no apt issue yet it is helped by the statute, because the parties doubted of nothing, but of the manner of the feoffment of *J. S.* whether it was made to *A:* or not, and of the same opinion was *Fennor*, *Yelverton*, and *Williams*. but not *Gandy*.

**C**Rate versus *Moore*, Mich. 3. Jacobi. In Replevin of Cattell taken in *D.* the Defendant avowes as Bayliffe of *H. Finch*, And the case was thus, the Lady *Finch* Mother of *H. Finch*, granted a Rent charge to *H.* issuing out of her Mannor of *N.* and out of all her Lands in *D. E.* and is in the County of *Kent*, belonging or appertaining to the said Mannor. And the Plaintiffe to barr, the Defendant pleads an abatement in *H. Finch* into the Lands in *D.* And upon the Defendant demurs for the Lands in *D.* were not belonging or appertaining to the Mannor of *N.* and adjudged for the Defendant. For no Land can be charged by that grant, if it be not belonging to the Mannor. And that for two Reasons, the first is because by the word (*aut alibi*) it appears that it is a last but one sentence, and the (*Aut*) conjoynes the words proceeding to wit, all the Lands in *D. S.* and to put in the County of *Kent* in these words following, to wit (*alibi*) in the said County to the said Mannor appertaining, and the sentence is not perfect untill you come to the last words, (to the said Mannor appertaining) for if the Rent be issuing out of the Land in *D. &c.* which

which is not appertaining to the Mannor, then the sentence must be perfect, and these words (*County of Kent*, and these (*aut alibi*) must begin a new sentence: which was never seen, that they should make the beginning of a sentence. And therefore this case is not like the case between *Bacon* and *Baker*, second of King *James*, in the prohibition, where Queen *Eliz.* grants all her sixth Hay, &c. within the liberty and precincts of *St. Edmonds Bury*, belonging and appertaining to the said Monastery, and which were lately collected by the Almoner of the said Monastery; for there the latter sentence is perfect and compleat: And these words (in the County of *Suffolke*) and the *nec non* that ensues are a new sentence: And therefore the last clause (And which by the Almoner, &c. goe only to the Tiths following the (*nec non*) and not to the Tiths contained in the first clause: but it had been otherwise if the (*nec non*) had been (*unacum*) as in truth the patent was, but it was mispleaded; for then the (*unacum*) would have reinjoyned all, and made it but one sentence. The second reason was, in respect of the nature of the thing granted, which was but a rent. And therefore, if rent be granted out of a Mannor, to be perceived, and taken out of one acre, this shall be good: and nothing shall be charged but that one acre only, 17. *Aff.* but otherwise it is of Land for a Feofment of a Mannor. To have &c. one acre it is a void *habend.* For here it appears, that the intent of the Lady *Finch* was only to charge the Mannor, and such Land only which were appertaining to the Mannor: But *Popham* held the contrary, for he conceived that *D. S.* and *W.* in the County of *Kent* were particularly named and bounded in by the name of the place and County, and therefore they should be charged, although they were not appertaining to the Mannor. As if a man grants all his Lands in *D. R.* and *V.* in the County of *M.* and in *Darn* in the same County which he hath by descent, it should only extend to *Darn*, but denied by the Court, but he was strongly of that opinion. And he held that by the first of the charge out of the Mannor; all the Lands parcell or appertaining to the Mannor are charged, and therefore the subsequent words if they should be limited, as is above-said, would be idle and frivolous. And *Yelverton* said, that the words before belonging or appertaining, shall be taken to extend to the Land occupied in the Mannor, although it is not parcell of it, and *Fenwood* and *Williams* granted, and Judgment was given that the Defendant should have a return *habend.*

**T**ott versus *Ingram*, *Trin. 4 Jac.* In a replevin brought by *T. a* against *I.* who makes consiance as Bailiff of *Sir Ed. Br.* for a common Fine which was assessed upon the Plaintiff who was resident within the Leet of his Master: The Plaintiff replies, that *Sir Edw.* by his deed had released to him all rents, services, exactions, and demands

out of his Mannor except suit of Court; the Defendant demurred: And *Nichols*; that suit of Court for which this common Fine was set is excepted, and therefore the common Fine is not released by that, but is excepted: also a common Fine is assessed, when the Jurors in the Leet do conceal that which they ought to find, and with which they are charged, and therefore the release being for exactions out of the Land: And this is not for any thing by reason of the Land, but because he doth misbehave himself; and by the opinion of the whole Court, a release of all demands doth not discharge a man of his suite to a Leet by reason of his residency; because a Leet is the Kings Court, to which every leige-Subject is to come and perform his allegiance to him. And also because suit of Court is inseparably incident to a Court-leet which cannot be released.

**P**allets Case, *Pasch. 5. Jacob.* In a replevin in which *Pallet* was Plaintiff, the case was such, where a man made a Lease of Lands, of which Land he was seized by a good Title, and of Land of which he was seised of a defeasible Title for years, rendering rent: and in the replevin, the Lessor avows for the whole rent: The Plaintiff in the replevin saith; that after the lease made, the Disseisee had entred upon part of the Land, and a demurrer. Sergeant *Hicham* moved for the Advowant that he ought to have a return; for he agreed that the rent should have been apportioned; but he said, that if a man avows for many things, and he hath right but to one, he shall have a return *habend. 5. H. 7. and 9. H. 7. And 4. Ass. Pl. 6.* where a man brings an assise for rent, and hath right but to part, yet he shall recover for that part, and cited the opinion of *Popham* put in *Walkers Case* in the third *Rep. 24.* when rent reserved upon a lease for years should be apportioned. If a man in an action of debt demands more than hee ought, yet upon a *nil debet* pleaded, the Lessor shall recover so much, as shall be apportioned and assessed by the Jury, and shall be barred as to the residue. But *Yelverton* was of another opinion; for he said, as this case is, the Avowant shall not have a return *habend.* But if the apportionment had been made by the Jury, he should have had a return *habend.* but in this case the apportionment must be made by the Judges, to whom the quantity of the Land cannot appear, and therefore they cannot make apportionment; for they all agreed that the apportionment ought to be according to the value of the Land, and not according to the quantity: And to prove this, he cited *Hubberd and Hammonds Case, 43. Eliz. co. lib. 427.* As where the Fines of Copyholders upon admittance are uncertain, the Lord cannot exact excessive Fines: and if the Copyholder deny to pay it, it shall be determined by the opinion of the Judges before whom the matter depends: and upon a demurrer to the evidence to a Jury upon the confession



feſſion or proof of the annuall value of land ; the annuall value ought to appear to the Judges ; but in this caſe the value doth not appear to them , and therefore they cannot make any apportionment , and therefore the Avowant ſhall not have a return *habend.* But *Tanfield* held the Avowant ſhould have a return *habend.* for the whole rent ; for the Judges could not apportion this , becauſe the value did not appear : and the eviction is matter of privity , which ought to be diſcovered by the Leſſee , and he ſhould give notice to the Leſſor , and he ought to ſhew the value of the Land from which he is enriched to the Judges. And *Popham* is of the ſame opinion ; for he ſaid the value of the Land ought to be ſhewed by the Leſſee , for every one ought to plead that which is in his knowledg , and that was in the Leſſee's knowledg , and not the Leſſor : and *Fenner* of the ſame opinion , but *Yelverton* and *Williams* againſt it ; for *Yelverton* ſaid , that it appeared that part of the Land was evicted , and therefore it ought to be apportioned ; but becauſe the value did not appear to the Judges , it could not be apportioned. *Williams* ſaid , that if the Leſſee ſurrender part , the Leſſor need not ſhew the value : and *Popham* agreed to that , becauſe the acceptions of the Leſſor had made him privy to it.

**K***Enrick* verſus *Pargiter*, *Trin. 6. Jacobi.* The Defendant juſtifies the taking of the Cattell damage feſant upon a ſuſmiſe of a cuſtome ; that the Plaintiff being Lord , hath the place in which &c. wholly to himſelf untill *Lammas* day : and after that day it is common for the Tenants , and the Plaintiff is not to put in but only three horſes , &c. And becauſe the Plaintiff after *Lammas* put in more cattell then three horſes , the Defendant took them damage feſant , as it was lawfull for him to do : And iſſue was joyned upon the cuſtome , and found againſt the Plaintiff ; and *Yelverton* ſhewed in arreſt of Judgment that the Defendant could not take the Cattell damage feſant , for it appears that the Defendant is only a Commoner : and it alſo appears , that the place in which &c. is the ſoile of the Plaintiff , and the Cattell cannot be taken damage feſant upon his ground , no more then the Tenant can have an Action of Treſpaſs againſt his Lord *quare vi & armis* , &c. in regard of his Seigniorie , as it is in *Littleton* , and 5. H. 7. But the Court ſaid , that the matter of taking the Cattell did not come into queſtion ; for nothing was in iſſue but the cuſtome , which is found againſt the Plaintiff ; for if the Plaintiff would have taken advantage of that , he ought to have demurred. And although by that he had confeſſed the cuſtom , yet whether ſuch Commoner could have taken , the Lords Cattell would then properly have come into debate. And by *Fenner* , *Williams* , and *Cook* , the taking the Lords Cattell damage feſant was good ; for by the cuſtom the Lord is to be excluded but only for his ſtint : and the Lord may well be

*A Commoner may take the cattell of the Lord damage feſant.*

stinted, and the whole vestive and benefit of the soile is the Commoners, and they have no other remedy to preserve the benefit they have in feeding their Cattell, but by taking the Cattell of the Lord if he offends. And the Custome hath made the Lord as meer a stranger as any other: and without doubt the Commoner might take the Cattell of a stranger, 15. H. 7. The chief Justice and *Yelverton* doubted of it: And although the Commoners by the custome had gained the sole feeding in the land of the Lord: Yet they ought to have shewed the custome, and also the usage to have distrayned the Cattell of the Lord damage fasant, and observe his.

Judgment arrested for not shewing in what place the Messuage did lye to which the Common did belong.

**B**Raxall versus Thorold. Trin. 8. Jac. In Replevin for the taking of 4 Oxen at *Coringham* in the County of *Lincoln*, in a place called *Dowgate leys*, Sept. 6. Jac. The Defendant says, the place contained four acres in *Coringham magna*, which was his Free-hold and justifies the taking damage fasant. The Plaintiff in his bar to the Avowry, that the place where &c. lies, in a place called *Barrerart* quarter, parcell of a great Common Field called *E.* in *Coringham* aforesaid: and that the Plaintiff the said time, and long before was seized of one Messuage, and of 14. acres of Land, Medow, and Pasture, with the appurtenances to the said Messuage belonging, and that the Plaintiff and all they whose estate the Plaintiff had in the Tenements, ought to have common, and so prescribed to have common for him, his Farmers, &c. Tenants, &c. for all comunable cartell levant & couchant upon the Tenements, &c. And upon issue taken upon the Common, it was found for the Plaintiff, and alledged in arrest of Judgment, that it did not appear by the Barre to the Avowry in what place the Messuage and Land to which the Common did appertain did lie, to wit, whether it did lie in *Coringham*, or in any other place or County, and this of necessity ought to have been shewed in certain, because the tenure ought to be both of the place where the House and Land did lye, and of the place where the Land did lye in which the Common was claimed, and therefore of necessity ought to have been shewed incertain, and shall not of necessity be intended to be in *Coringham* where the Common is; For a Common may be appendant or appurtenant to Land in another County. And the tryall shall be of both Counties, and Judgement was arrested by the whole Court.

Common, when the field and acres unown the sowing of parcell shall not debar him of his common in the residue.

**T**Ruelock versus Riggsby Mich. 8. Jacobi. In Replevin, for the taking of six Kine in a place called *Brisley* hill, in *Radley*, in the County of *Berks*, the Defendant as Bailiff of one *Read*, makes Connissance that the place, where, &c. contains fifty acres, and is parcell of the Mannor of *Barton*, whereof the place, where, &c. is.

is parcell, and shoves that *E. 6.* was seised of the Mannor of *Barton*, whereof the place where is parcell, and granted it by Letters Patents to *R. Leigh*, and divers other Lands. by the name of the *Coxleyes*, &c. and amongst other particulars in the Patent, the King granted *Brisley* hill in *Barton*, and deduces the Free-hold of the Mannor, of which the place, in which, &c. is parcell to *Read*, and he as Bailiff to him, took the Kine damage Fesant: the Plaintiff replies, and shows that one *Hide* was seised of a Messuage, and divers Acres of Land in *Radley*, and that he and those, whose estate he hath for himself, his Farmers and Tenants used to have Common in the said place called *Brisley* hill in *Radley*, when the said Feild, called *Brisley* hill in *Radley*, was fresh and not sowed, all that yeare with their Cattell *Levant* and *Conchant*, and when the Field was sowne with Corne, and when the Corne was carried away, untill it was referred, and so justifie the putting in of six Kine using his Common, because the Feild was not sown with Corne at the time, to which the Defendant pleads, and saies, that part of the Feild, called *Brisley* Hill in the Avowry named, was at that time sown with Corn, &c. and the Plaintiff demurres, and adjudged for the Plaintiff for two reasons. The first was, because the Defendant in his Avowry referres the taking of the Cattell to another place, then that set forth in the Avowry, which is not in question, and in which the Plaintiff claims no Common, for the Plaintiff may claim Common in *Brisley* hill in *Radley*, and the place named in the Defendants Avowry, to which he referres his Plea is *Brisley* hill in *Barton*, for *Brisley* hill in *Radley* is not named in the Avowry by any speciall name, but onely by implication, by this name the place in which, &c. and for that reason the rejoinder doth not answer the matter in the replication. The second cause was, because the Plaintiff claims Common, when *Brisley* hill in *Radley* was unsown with Corn, and the Defendant to that, although his Plea should referre to the same *Brisley*, yet hath he given no full answer, for he saith that parcell of the said Feild was sowed with Corn, and the Court held that sowing of parcell of the Feild shall not hinder the Plaintiff from using his Common in the residue, for that may be done by covin to deceive the Plaintiff of his Common, for the Plaintiff claiming his Common, when the Field, that is, the whole Feild is sown, shall be barred of his common by sowing of parcell of it, notwithstanding that parcell be sowed, the Plaintiff shall have his common by the opinion of the whole court.

**G**odfrey versus *Bullein*. *Mich. 8 Jacobi*. *Bullein* brought a *Replevin* against *Godfrey*, for the taking of six Beasts, in such a place in *Bale*, in the County of *Norfolk*: the Defendant as Bailif of *R. Godfrey* makes consiance, because before the time, and at the time, in which

which &c. the said *R. Geoffrey* was seised of a Court Leet in *Baile* of all the inhabitants, and resident within the Precinct of the Mannor of *Baile*, to be holden within the Precinct of the Mannor, as appertaining to his Mannor, and shews, how that he had used to have a Fine of ten shillings, called a Leet Fine of all the cheif pledges of his Leet, and if they failed to pay, the Steward had used to amerce them that made default in payment, & shewed, how that at a Court holden within the Mannor, such a day it was presented, that the Plaintiff in the *Replevin* being an inhabitant in *B.* and resident within the Precinct of the Mannor, made default in payment of the said Fine of ten shillings, being then one of the cheif pledges of the Court, by reason whereof he was amerced at five pounds, which being not paid, the Defendant took the Beasts, and the Issue was, whether *Bullein* at that court was a cheif Pledge or no, and the *Venire* to try his Issue was onely of the Mannor, and found for the Plaintiff, and damages, and costs to thirty pounds given against *Geoffrey*, upon which he brought a Writ of Error, in the late Kings Bench, and adjudged Error and the Judgement reversed, for the *Venire facias* should have been both of *Bail* which was the Village, as of the Mannor, for although the Court be held within the Mannor, yet the Leet it self is within the village of *Baile*, and the Plaintiff was an inhabitant, and resident within the village, which village is within the Precinct of the Mannor, and though *Fleming* cheif Justice held, that nothing was in question but whether the Plaintiff was cheif pledge at the Court held within the Mannor or no, and so nothing within the village is in question, or could come in Issue, yet it was resolved by the whole Court, but him, that those of the village of *Bail* might well know whether the Plaintiff being an inhabitant within the village in which the Leet was, were a cheif Pledge at the Court or no, for to have cheif pledges, doth properly belong to a Leet, which Leet is within the village, and therefore they of the Mannor cannot have so good knowledge of the matter, as they of the Mannor and village together, and therefore they all ought to have been of both, as in the Case of *Common*, or a way from one village, to a house in another village, this ought to be tried of both villages, and so also of the Tenure of Land in *D.* held of the Mannor of *Sale*, the triall must be as well of the village, where the Land lies, as of the Mannor of which the Land is holden, as it was adjudged *Hill. 45. El.* in the then Queens Bench, in the Case between *Lovlace* and and Judgement was reversed, and see *6 H. 7.* and *Arundels* case, in my Lord *Cooks* Reports.

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perfected and  
delivered as a  
Deed, one a-

**B**urglacy versus *Ellington*. Burglacy brought a *Replevin* against *Bellington*, for the taking of his cattell, &c. the Avowant pleads that one *W. B.* was seised of the place in which, &c. in his Demefne,

as

as of Fee, and being so seised died, by reason whereof the Land descended to one *Crist*. his Daughter and Heir, who took to Husband the Avowant, the Plaintiff in his Barr to the Avowry, confesses that *W. B.* was seised, and that it descended to *C.* who took to Husband, the Avowant, but he further said that the 16 of *April*, *primo Jac.* the Husband and Wife by their Deed indented, and inrolled, did bargain and sell the same Land unto one *Missenden*, and a Fine levied by them; and that *M.* the 30 of *James*, bargained and sold it to *F. M.* in Fee, and he being so seised, licensed the Plaintiff to put in his cattell, the Avowant replies, if in the said Bargain and Sale made by the Husband and Wife, a *Proviso* was contained, that if the said *Ellington* should pay one hundred pounds a year after, then, &c. and pleaded the Statute of 13 *Eliz.* of usury with an averment that the profits of the Land were of the value of twelve pounds by the year, the Plaintiff rejoined that true it is, there is such a clause in the Indenture but he further said, that before the sealing of the Indenture, it was agreed by word, that the said *Ellington* should have and receive the profits, and not the Plaintiff, and thereupon the Avowant demurres, and the Case was thus, *Ellington* bargains his Land to *M.* for the payment of one hundred pounds a yeare after to be paid, and that the Bargainee should have the profits, the bargainer enters as upon a void Sale, because of the statute of usury, for by the *Proviso* he is to have the hundred pounds, and ten pounds for the forbearance, and by the Law, he is to have the profits, and the which did amount above ten pounds by the hundred, the bargainee to avoid the usury pleaded an agreement by word, before the sealing of the Bargain and Sale, and the question arising upon this was, if the Bargainee might plead this verball agreement, for the avoiding of the Deed which did suppose the contrary, and *Moore* of *Lincolns* Anne counsell, was of opinion that he could not put that maxime that every thing must be dissolved by that, by which it is bound, and his whole argument depended upon that, and he cited divers Cases, as 1 *H. 7.* 28. 28 *H. 8.* 25. 1 *Eliz.* *Dier* 169. *Rutlands* Case 5 *Rep.* and *Cheyney* 6 Case there, but the whole Court without any argument were of opinion, that he might plead the verball agreement, and avoid the usury, and first they all agreed, that when a Deed is perfected and delivered as his Deed, that then no verball agreement afterwards may be pleaded in destruction thereof, as it is in the Cases put, but when the agreement is parcell of the Original contract, as here it is, it may be pleaded and secondly otherwise it would bring a great mischief, being the custome so to do by word, but if it had been expressed within the Deed, that the Bargainee should have the profits, and that it was delivered accordingly that no agreement or assignment of the profits could now avoid it, for it is an usurious contract, and therefore the whole court,

greement after pleaded in defeasance thereof, and when the agreement is parcell of the Original contract, it may be pleaded.

gave



gave Judgement for the Plaintiff that he might well plead the agreement.



*Actions of Trespafs and Battery.*

*The Defendant  
in his Demur-  
ver answers not  
the whole De-  
claration, and  
Judgement re-  
versed.*

**J**ohnson versus Turner, *Trin. 44 Eliz.* Trespasse brought for breaking the Plaintiffs house, and the taking and carrying away his goods, the Defendant justifies all the Trespasse, the Plaintiff, as to the breaking of the House, and taking the goods, and the matter therein contained demurres upon the Defendants Barr, the Defendant joins in demurrer in this form, to wit, because the Plaintiff aforesaid, as to the breaking of the House, and taking the goods is sufficient, demands Judgement, and Judgement given in the Common Pleas for the Plaintiff, and a Writ to inquire of Damages, upon which Damages are assessed for the breaking of the House, and taking the goods, and whether the subsequent words, to wit, and the matter therein contained go to the whole matter in the Barr, to wit, to the carrying of the Goods away also, for when the Defendant joyned in Demurrer with the Plaintiff he joyned, specially to wit, to the breaking of the House, and taking the Goods, but nothing of the carrying them away, and so as to the carrying of them away, nothing is put into Judgement of the court, yet the Writ to inquire is for the whole, and the Judgement also, and the carrying of the Goods away being parcell of the matter, and for which greater Damages, are adjudged, and that being not put into the Judgement of the Court by the Demurrer, therefore the Judgement is erroneous, for there is a discontinuance, as to the carrying of the Goods away, which is part of the matter, and this businesse concerned Mr. Darcy of the privy chamber, concerning his patent for Cards.

**P**urvell versus Bradley. *Pasch. 1 Jacobi.* The Plaintiff declares in Trespafs, wherefore by force and Arms, such a day the Defendant did assault him, and one Mare, price six pounds, from the person of the Plaintiffe, then and there did take, and Telverton moved for the Defendant in arrest of Judgement, and the Declaration was not good, for the Plaintiff did not shew any property in the Mare, for he ought to have, that it was his Mare, or the Mare of the Plaintiff, for as it is laid in the Declaration, the words may have two intendments, that the property of the Mare was to the Defendant, and then the taking was lawfull, or that the property was in the Plaintiff, and then

then the taking was wrongfull, and it being indifferent, to whether it shall be taken most strongly against the Plaintiff, for his is not a fault in form, which is helped by the Statute, but it is a defect in matter, and then the Jury having assessed intire Damages for both the Trespases, and that no cause of Action is supposed forme, the verdict was not good which the Court granted.

**F***Reswater, vers. Reus, Mic. 2 Jac.* tenant in tail, covenanted to stand seised in consideration of a marriage, to be had by his Son, with the Daughter of J. S. to the use of himself & his heirs, untill the marriage be had, & afterwards to the use of himself for life, & afterwards to his Son and his wife, the daughter of J. S. and the heirs of their bodies, and suffers a recovery with a single voucher to that purpose, they die without Issue, and adjudged that the Entry of him in the Remaindant depending upon the estate Tail was lawfull, for first there is no consideration, to raise an use for the consideration, is onely the marriage of his Son with a stranger, the which as to the changing of the possession is not any benefit to the Father, for he is as a stranger to that personall & particular consideration, but if the consideration had been for the establishing of the Land in his name and blood, it had been good, for that onely concerned the Father, and the whole Court agreed, that although it were an alteration of the Estate, as to himself, but not to strangers, for if he had after such Covenant to stand seised took a Wife, she should have had Dower.

In Trespasse the Proces is Attachment and Distress infinite, but if *nihil* be returned, Proces of Outlary lyes; and if the Defendant be returned attached by such Goods and Chattels, if the Defendant omit to cast an Essoine at the returne of the Writ of Attachment, he shall forfeit the Goods by which he was attached, but if he cast an Essoine, he shall have a speciall Writ, reciting the matter to the Sheriff, to deliver to him his Goods or Cattell, although he doe not appeare at the day of the adjournment of the Essoine: And if the Defendant at the returne of the Attachment will appeare without an Essoine he may, and then he shall not forfeit the Goods: And note, the Essoine shall not be adjourned by, from fifteen dayes to fifteen dayes: And if the originall Writ be against many, they shall have but one Essoine in personall Actions: And if a Lord of the Parliament appeare nor, he shall forfeit an hundred pounds, and upon issue joyned in this Action, the Proces against the Jury, is the *Venire facias*, *Habeas corpus*, and *Distresse*: And if a Baron of the Parliament be a Defendant, then if a Knight be not returned upon the Pannell, the Defendant may at the Assises quash the Pannell; and if at the Assises the Jury doe not appeare full, to wit, twelve men, this may be supplied by the Justices at the request of the Plaintiff; and the Sheriff ought to returne two Hundreds at the least in this Action, and so in every personall Action; but foure in reall Actions; for if

a challenge be made, *Pro defectu hundredo*, if two be not returned, the Jury shall remaine; and a *Disfringas*, with a *Decem tales* shall be awarded, returnable in Court, but no circumstances shall be awarded in Court, for if the Jury in Court doe not appeare full, or are challenged, for that the Jurors have no freehold, and it be tryed, a new *Habeas corpus* shall issue out with a *Decem tales*, if it be desired: And if the Jury appeare full in the Court, and the Array be challenged, either for that it was of the Plaintiffs denomination, or that the Sheriff or under Sheriff who returned the Jury, are of the Kindred of the Plaintiff, or any other principall cause of challenge, and this is confessed or tryed by two of the Jurors who have appeared, being assigned and sworne by the Court to be tryers of the challenge, who shall give their Verdict that the challenge is true, then the Array shall be quashed; and if he that arrayed the Pannell remaine Sheriff, the *Venire facias de novo*, shall be awarded to the Coroners, if there be no cause of exception against them or any of them by reason of Kindred, or any other principall cause: And if there be cause of challenge to any of them, the *Venire facias* shall issue to the rest, and his companion shall not intermeddle with the execution of it; and if there be good cause against all, then a *Venire facias* shall issue to *Eslicors* to be appointed by the Court to returne the Writ, but if the Sheriff who returned the first Pannell be removed, then a new *Venire facias* shall issue to the Sheriff who shall be then in Office: And note, no challenge shall be made to the Array returned by the *Eslicors* but by the Poll; and if the Jury appeare full, and no challenge be made untill twelve be sworne, the Jury shall proceed to heare their Evidence, and give their Verdict; and if the Jury finde for the Plaintiffe, then they shall give costs and dammages, but if they find for the Defendant, they shall finde neither costs nor dammages: And the Judgement for the Plaintiff is, that the Plaintiff shall recover his dammages found by the Jury and costs of suit, but if the Jury find for the Defendant, the Judgment is, that the Plaintiff shall, *int. capiat per breve*, but if Judgement in this case had lyen, a *Nil dicit confession.* or *Non sum informat.* then the Court shall award to the Sheriff a Writ to inquire of dammages, and no challenge lyes to the Jury upon a Writ to inquire: And if the Sheriff returne but twenty and one upon the Jury, and twelve of them appeare, and try the Issue and give a Verdict, it is a good Verdict, but if onely ten or eleven of them appeare, and the Jury be made up at the Assises, *De circumstantibus*, and the Issue be tryed and a Verdict given, it is naught, and not holpen by the Statute: And if the Issue be joyned, and the Sheriff be cozen to the Defendant, the Plaintiff shall not have a *Venire facias* upon the challenge of Kindred of the Sheriff to the Defendant, but it ought to stay untill that Sheriff be removed

removed and another Sheriff made: And if the Defendant be Lord of the Hundred, within which Hundred the ten doth arise, the Plaintiff may shew that, and have a *Venire facias* to the next Hundred; or if the Array be quashed for that cause, he may have a *Venire facias* to the Coroners of the next Villiage in the next Hundred next adjoining: And note, The *Venire facias* shall not issue to the Coroner but upon the principall challenge, and if a challenge be to the *Tales*, and that be found true, the *Tales* onely shall be quashed, and the principall Pannell shall stand: And if an Issue be joyned between the Mayor and Commonalty of a City, and another concerning a Trespaß done within that City; the Plaintiff surmising that the Sheriff and Coroners are Citizens of that City, may pray a *Venire facias* to the next County of the body of the County, or of the next Villiages in the next County: And if the challenge of Kindred be not rightly alleadged in the challenge, it matters not if it be Kindred; and if a *Venire facias* be quashed, because it was returned by the Under Sheriff who was Kin to him, or other good cause, it shall be quashed, and the *Venire facias* shall be returned by the high Sheriff, with words init, that the Under Sheriff shall not intermeddle with it: And if the Array be challenged and affirmed, the Defendant may after challenge the Poll, and must shew his cause of challenge presently: And if the Land in question lye in foure Hundreds, if foure of any Hundred appeare, it is good; and note, That the challenge of the Array shall be drawne in Paper, and delivered presently after the Jury appeares; and the Defendant is not bound to make good his challenge with these words, *Et hoc parat. est ver. iscare, &c.* And those that try the principall challenge may also try the challenge upon the *Tales*, if the King had been party alone no challenge was to be allowed, but if the suit had been in the name of another, who sued as well for the late King as for himselfe, in a Writ to inquire of waste after a distrefs, no challenge to the Poll lyes.

It is good cause to challenge a Juror because he was attainted in a conspiracy or attainit, or if any Juror was put into the Pannell at the desire of the party, it is good cause of challenge to the Array: And if a Jury of two Counties, and both Arrayes are challenged, two of one County shall try the Array of that County, and two of the other County shall try the Array of the other County, and they shall not joyne untill they be sworne of the Principall, and two of one Hundred and two of the other Hundred doe suffice, if in Trespaß the Defendant justifie as a Servant to the Lord and by his commandement. It is good cause of challenge to the Juror that he is a Tenant to the Lord, although the Lord be no party to the Record; and if Proceß by challenge is awarded to the Coroners, the Proceß afterwards shall not goe to the Sheriff, although there be another Sher-

riff, but after Judgement execution shall issue to the new Sheriff: And where a man challenges the Polls of the principall Pannell, he afterwards shall not challenge the Array of the *Tales*, and if the Array be quashed, it is entred upon Record, but if it be affirmed then it is not entred.

If Trespasse be done in diverse Townes in one Shire, they may all be joyned in one Writ, to wit, why by force and armes the Closes and Houses of the Plaintiff at *A.B.* and *C.* have broken; and, &c.

*The mistake of the day of an Act by way of Barr, not prejudiciall.*

**W***Olsey* versus *Sheppard*, Constable, The Constable being Defendant justifies the Imprisonment, by reason that the Plaintiff kept one Alehouse against the forme of a Statute of *Queen Elizabeth*, and therefore by the warrant of two Justices he was committed to Prison, and Issue was, that he did not keep an Alehouse against the forme of the Statute aforesaid; and indeed the Statute was made in *Edw. 6.* time, and the Jury found that he did keep an Alehouse against the Statute in *Edw. 6.* time: And the Court held the mistaking of the day of the Act is not prejudiciall by way of barr, but by way of count it must be layd truly.

*A confession after an issue joyned, refused.*

**G***lasbrook* versus *Einsey*, *Pasch. 16. Jacobi*, in Assault and Battery, the Defendant pleaded not guilty, and the next terme after the Writ of *Venire facias* was awarded, the Defendants Attorney would have confessed the Action by *Relicta verificatione*, which the Plaintiff did deny to receive, having took out his *Venire*, and that those Errors which had escaped in the proceedings by that confession were not holpen as they are after tryall; and it was much controverted by the Court, whether the Defendant without the consent of the Plaintiff might confesse the Action; and the Court was in severall opinions, but because the Plaintiff always prays for the confession, it seemed he might refuse the confession; and afterwards it was adjudged the confession should not be received, because it appeared to the Court to be but a practice to lessen the Plaintiffs Damages.

**C***ook* versus *Jenman*, *Trin. 12. Jacobi, rotulo 329.* An Action of Trespasse and Battery was brought the last day of *October, 10 Jacobi*: The Defendant as to the force and armes sayes nothing, but pleads generally that he and one, in the sayd last day of *October* did joyntly enter into the Plaintiffs at *S.* and did then and there assault the Plaintiff; and that afterwards, to wit, such a day and yeare, the said Plaintiff did by his Writing, &c. release, &c. the said *R.* of all Actions, &c. And avers it to be the same Trespasse whereof the Plaintiff complained, and the Plaintiff traverses without this, that the Trespasse, &c. was joyntly done, and demurrer upon this Plea, pretending



tending the Trespass is severall and not joynt, and so no satisfaction, but it was held a good Plea, for the Battery was joynt or severall at the Plaintiffs election, to have his Action against one or other: And a satisfaction by one is a satisfaction for all, and the Plaintiff cannot have severall dammages, but one dammage against them all, and he hath his choice, as in *Heydens Case*, to have the best dammages.

**C**ook versus *Darston*, *Mich. 15. Jacobi*, An Action of Trespass brought by the Committee of a Lunatique being a Copy-holder to whom the Lord had committed the Lunatique, and a stranger sowed the Land, and the question was, whether the Committee or the Lunatique should have the Action, and the Court held, the Action should be brought in the name of the Lunatique.

**Y**ounge versus *Bartram*, Battery brought by the Plaintiff against Husband and Wife and two others, the Woman and one of the others, without the Husband plead not guilty, and the Husband and the other plead, *Son assault demesne*, and tried, and alleadged in arrest of Judgement, because the Wife pleaded without her Husband, and Judgement stayed and a Repleader by the whole Court.

**C**Rogate versus *Morris*. If a stranger come over a Common, the Lord may have an action, but not the Commoner; for the petty Trespass, multiplicity of actions will not take away my action: & except it be a damage whereby I lose my Common, I can have no action. If a stranger come and eat up my Common, a Free-holder may bring an Assize of common, for it is a Disseisin; for a Disseisin of Common, is the taking away the profits of the Common: And an action of case will lye against the Lord for cutting down the body of the tree, when the Tenant should have the loppings; if the Commoner may have his Common, although another take away part of my Common, yet no action lyeth. As if one beat my servant lightly, except the Master lose his service, no action lieth. And if my friend come and lye in my house, and set my neighbours house on fire, the action lyeth against me, and Judgment for the Plaintiff.

**H**Atton versus *Hun*, *Trin. 13. Jacobi, rotulo, 3314*. In Trespasse and Imprisonment, the Defendant justifies by vertue of a *Capias*, and the Plaintiff did afterwards escape, and he being Sheriffe, did follow him by vertue of the said Warrant taken upon the *Capias*, the Plaintiff replies that he escaped by license of the Sheriffe, and traverses the latter taking by vertue of the Warrant: and the Court held the traverse idle, because the Plaintiff had sufficiently confessed, and avoided.

avoided : and if he escaped by the Sheriffs License , that ought to be the thing put into issue, and not the traverse.

**P**etry, versus *Wilsh*, Trin. 9. *Jacobi. rotulo* , 1055. An action of Trespass brought , wherefore by Force and Armes he broke the Plaintiffs Close, and eat his Grasse, &c. The Defendant justifies for common of pasture , and saith, that he was seised in Fee of one Messuage , with the appurtenances in G. and used to have common for all his Cattell , levant and couchant upon the said Messuage. And it was moved after a verdict in arrest of Judgment by Sergeant *Nichols*, that the plea was insufficient, because the certainty of the Cattell was not expressed, as for 200. or the like : but the Court held the contrary that levant and couchant is a certainty sufficient, and all the Books prescribe for a Common by reason of a Messuage.

*A Constable  
cannot detain  
one, but for  
Felony.*

**R**inghall versus *Wolsey*, Mich. 11. *Jacobi rotulo*, 820. An action of Trespass brought ; wherefore by force and Armes the servant of the Plaintiffs out of the service of the said Plaintiff , hath taken and laid to be at H. The Defendant justifies that one was possessed of Corn at S. And that the said servant by the command of his Master, had carried away the Corn : and that the Owner came to the defendant, being Constable, and prayed him to detain the servant untill hee could procure a Warrant of a Justice of Peace, and traverses that he is guilty at H. The Plaintiff demurres, that it was held by the Court a naughty plea : First , because the Constable could not detain any man but for Felony : And secondly , the traverse is naught , because the Trespass is in the same County, and so he might have justified as well in H. as in S.

**D**Arney versus *Hardington*, Pasch. 9. *Jacobi rotulo*, 1857. An action of Trespass brought, to which the Defendant pleads a justification for an Amerciament set in the Sheriffs turn ; to which Justification exceptions were taken. First, because the Defendant justified by vertue of a precept to him lawfully granted, & saith not at what place. Secondly, he prescribes for the turn to be held, and doth not any, or what estate, &c. And *Hutton* said , that a prescription for a turn, or one hundred Court by what estate , is naught , because a hundred is not manurable , but lies in grant ; but he ought to have said , that the King and all they that were seised of the said Hundred have had, and from the time , &c. And my Lord *Cook* said , that a prescription by what estate for a thing incident to a Mannor is good, for an Hundred that lies in grant, it is naught : And he and *Warburton* held that except it was shewed before whom the turn was held, it was naught ; because where any thing is taken by common right as the Sheriffs

Sheriffs turn, it ought to be holden before the Sheriff, as in the prescription it ought to be shewed, before whom the turn was held, or else it would be naught.

**R**oberts versus Thacher, & al. Hill. 11. Jac. rotulo, 1928. An action of Trespass brought; wherefore by Force and Arms the Close and House of the Plaintiff at *A.* did break, and a certain Cow, price, &c. took. The Defendant saith, that the Plaintiff ought not to have his Action against him, because he saith that the Close & House is one Messuage, &c. in *A.* aforesaid: and that before the time in which, &c. such a one was possessed of the said Cow, as of his own proper Cow, to wit, at *A.* aforesaid; and being thereof so possessed, certain Malefactors unknown to the said, &c. before the said time, in which, &c. the said Cow out of the possession of the said *B.* did feloniously steal, take, and lead away, whereupon he made Hue and Cry; and thereupon hee had intelligence, came, and was in the possession and custody of the Plaintiff, and *B.* upon notice thereof, did request the Defendant to ask the Cow of the Plaintiff, and to bring her, &c. By reason whereof, the Defendant the said time, in which came to the said Messuage by the usuall way, by and through the said Close, &c. to demand, &c. And the Defendants then & there finding the aforesaid Cow in a wall'd parcell of the Messuage, they took the Cow from thence, and brought her to the said *B.* and to him delivered her, as &c. which is the same Trespass, to which plea the Plaintiff demurres, and it was adjudged a naughty Justification for these reasons. First, because it doth not appear but that the Plaintiff had good right to the Cow. Secondly, because the Defendant took the Cow without demand. And thirdly, it is not pleaded that the Defendants were servants to the said *B.* *R.* and that he did it by his command, and therefore Judgment given for the Plaintiff.

**H**all versus Stanley, & al. Pasch. 9. Jacobi. rotulo, 2289. An action of false imprisonment: The Defendant as to the whole Trespass except the Battery and Imprisonment, and keeping in prison not guilty: And as to that pleads that the Marshals Court is an ancient Court, &c. and so justifies, because the Plaintiff was the pledg of *T. C.* to the Defendant in an action of trespass upon the case in an *indebilitat. assumpsit* generall, and thereupon a Judgment against *C.* and a *Capias* awarded, and a *non est invent.* returned, and thereupon a *capias* awarded against *Hall* the pledge according to the custome, by vertue whereof the said *Hall* was taken and detained, and traverses that he was guilty, &c. of any imprisoning the Plaintiff before such a day, and averres that they are the same persons: And the Plaintiff

*Marshalsey hath no authority to hold plea in debt, except both are of the Household.*

replies,

*Actions of Trespass and Battery.*

replies, that neither *R. C.* nor *T. T.* at the time of exhibiting the Bill were of the household, &c. The Defendant demurs, and Judgment for the Plaintiff: and the whole Court agreed, that the Marshalls Court could not hold Plea, Covenants, and Contracts, except both of them were of the household of the King; and all the matters of which they could hold plea, were *Trespass, Covenants, and Contracts* of the household, and within the verge, to wit, within twelve miles of the Court, and *Doddridge* said that before the Statute of 28 l. as it appears by *Fleta* and *Brian*, the authority of the Marshall was absolute in civil and criminal causes at the Common Law, and that Statute restrains them for Debts, but not for Trespasses of what nature soever, and therefore see the Statute of 30 l. 1. 5 E. 3. ch. 2. and 10 E. 3. ch. 2.

**S**waife versus Solley, Trin. 14 Jacobi. rotulo 689. An Action of Trespass brought, wherefore he took his Close, the Defendant justifies for a way, the Plaintiff replies that he did the Trespass of his own wrong without any cause alledged, and so an Issue joyned, and after a Verdict, for it was moved in arrest of Judgement, that the Issue was not well reined, and prayed a new Triall, because the Issue ought to be speciall, but that exception was disallowed, and adjudged that it was helped by the Statute of *Jeofails*, by the opinion of the whole Court.

**P**laint versus Thirley, Hill. 6 Jacobi rotulo 161. An Action of Trespass brought, wherefore by force and Arms, the Goods and chattells of the plaintiff did take and impound; the Defendant pleaded the common Barr, and the plaintiff assigns the place, and are at issue upon that, and after a verdict it was moved in arrest of Judgement that there was no Issue joyned, because the Lands are not in question, and so no assignment necessary, and Judgement was stayed, but afterwards upon a motion Judgement was given for the plaintiff, because the Issue was holpen by the Statute of *Jeofails*, and there was the like case upon a Demurrer, in the court of common pleas, Trin. 4 Jacobi, rotulo 1131.

**C**hild versus Heely, 13 Jacobi, rotulo 3381. vel 381. An Action of Trespass brought, wherefore by force and Arms, the Close, Hedges, and Gates, of the Plaintiff at *w.* did break, and his grass with walking over it did destroy, and other his Grass with Cartell did eat and consume, the plaintiff assigned one Close of pasture called *Drew*, and another close called *Sutton*, one other close called *L.* and the Defendant as to the Trespass, except the breaking of the close called *G.* and *P.* and the treading, &c. with his feet, and eating with his cattell in the said close called *P.* and *E.* not guilty, and as to the break-

breaking of the close, &c. saith the plaintiff ought not to have his Action, because he saith that *E. 6.* was seised of the Mannour of *W.* of which one *Mesnage &c.* was copy-hold and shews the custome for a way, and another custome for a Common, and conveys the Copyhold to himself, and justifies, as to the *pedibus ambulandi*, and as to the Trespasse with the Cattell justifies for Common, the Plaintiff replies as to the Trespasse *pedibus ambulandi*, that it was of his own wrong without any cause alledged, and traverses the way, and as to Trespasse with the Cattell demurres, and the cause of the Demurrer was, as it appeared by motion, because in the justification of the Cattell the Defendant had not alledged any custome for Common, and so the Plaintiff could not take any Issue of that custome, but had alledged a custome for the way, as for the common, and the court were of opinion that it was well pleaded, and Judgement upon the Demurrer for the Defendant.

**F***Airchild versus Gair Pasch. 3 Jac.* An Action of Trespasse brought for the tiths of the Church of *B.* and therein a speciall verdict was as followeth, the Defendant was collated to this Church of *B.* being a Donative by *A.* and *B.* the Patrons, and that the Church was exempt from the Jurisdiction of any Ordinary, the Defendant resigned to *A.* and *C.* who was a stranger, and to other persons who had no Interest, his Church of *B.* with all Rights, &c. and afterwards the persons passe their Rights to *D.* who collates and interests the Plaintiff in the Church, by reason whereof he seised the Tithes in question, and the Defendant took them, and concludes that upon the matter, &c. and if the Resignation be good, then they find for the Plaintiff, otherwise, for the Defendant, and by the opinion of the whole Court, Judgement was given for the Plaintiff, for the Resignation was good, both in respect of the thing resigned, and of the person to whom it was made, for it being a Donative, and exempt from ordinary Jurisdiction, the Resignation must be into his hands, and the Incumbent shall not be constrained to keep the Church, whether he will or no, if the Patron will not accept it, and because there is no person, to whom the Resignation can be made, but onely into the hands of the Patron, it is good, and although the Resignation be to one Patron, and to a stranger, it is good to both the Patrons, and void as to the stranger, and the more strong it is, because of the following words, (to wit, to all persons whatsoever, which words involve all, that have any manner of interest, and then seeing it is found, that *D.* who collated the Plaintiff, and the Estate of both the Patrons, although no agreement be found of the Patrons, it is not materiall, and the resting of the Plaintiff in the Church is good to give him power to take the profits by reason of the primer possession, and although the De-



fendant did resigne but the Church onely, yet it is good to all that appertains to the Church, and that which the Defendant may have as Rector there, 6 E. 3. is, that if the Patron grant *Ecclesiam*, that will passe the Avowson, but *Herlethen* said, that was in ancient time and therefore not so then, to which the court seemed to agree, and the court waived the Dispute of any other thing, but onely the Resignation, for of that onely the Jury doubted, and was onely referred to the court, but *Popham* chief Justice said, that if the Patron would not collate any man to such a Donative, there was no way to compell him, but he is left to his own conscience, and he might in time of the vacancy take the profits, and sue for the Tithes in the spirituall court, for such Donatives at first grow by consent of all persons, who have any manner of Right or Interest, to wit the Ordinary, and Parishioners, but *Gawdy*, *Fenner*, *Yelverton*, and *Williams*, against him, that the Ordinary might compel him to collate any clerk, for the Rectory is only exempted from the power of the Ordinary, and not the Patron, and that is onely as to charges to be taxed upon the church, for the ordinary attendance in a Visitation, and such like, and *Popham* said, that although the Church in execution of the charge is spirituall, yet the patron may collate, and a meer lay man, as the King may make a temporall man a Dean, which hath often happened, but all the other Judges were against him in case of the person, which is meerly spritual, but as to the Deanery, they did agree it, for the function is temporall, but yet *Williams* said, that lay men who have Deaneries, ought to have, and at all times used to have a Dispensation from the Archbishop, and if the Incumbent in this Case should preach Heresie, as the Attorney and *Popham* said, the Ordinary might correct him, for the parson is not exempted out of his Jurisdiction, but his Parsonage onely, but by *Gawdy* and the rest, the Ordinary could not meddle with him, for the Parson is priviledged in respect of the place, but the Patron may commission and examine the matter, and thereupon out and deprive him, and so it happened in *Coverts* Case, as *Gawdy* and *Williams* said, wherein the Bishop of *Winchester* was the Donor of such a Donative, 13 E. 4.

**L**ee versus *Lacon*, 3. Jac. In trespafs, the action was Land in the County of *Salop*, and not guilty pleaded, and the *venire facias* was made with a space for *Salop*, but *Salop* was not named there: And by vertue of that Writ the Sheriffe of *Salop* impannelled the Jury, and found for the Plaintiff, and the matter above specified was moved in Arrest of Judgment, to wit, that the *venire facias* was vicious, and so a mistriall; but by *Fenner* and *Williams* it was to be accounted his, if no *venire facias* had been awarded: And so indeed by the Statute of *Jeofailes*; for the County, to wit, *Salop*, is omitted, and

and left out, and so the Sheriffe of *Salop* had no power nor authority to summon the Jury, because the Writ which is his Warrant is generall (to the Sheriff) and not naming of any County: but the Court held it to be the best way to amend it, and they put this difference: For when the action is laid in *Salop*, and upon a special pleading, the issue is drawn into a forreign County, there the entry and award of the *venire* upon the Will is speciall, to wit, to the Sheriff of that County, where the issue arises to be tryed: and in such case a *venire facias* with a blank shall not be good, because it cannot be judged to which of the Sheriffs the *venire* was to be awarded, and upon that incertainty it shall be naught: but when the generall issue is taken, or the matter is triable in the same County where the action is laid, there the *venire facias* is awarded generally, and must of necessity be intended to be the Sheriffe of that County where the action is laid, and cannot be otherwise intended: and for this reason it was but the default of the Clerk which is amendable, and so it was amended.

**B** *Aylie versus Moon, Trin. 3. Jacobi.* An action of Battery brought in *Plymouth* Court before the Major and Bailiffs there, and not guilty pleaded: but afterwards the issue was waived, and Judgment was given for the Plaintiff, and a Writ to enquire of damage was awarded to the Serjeant of the Mace, that by the oath of twelve, &c. he should inquire: and the Writ was made returnable at the next Court before the Maior and Bayliffs. And upon a Writ of Errour brought, it appeared by the Record certified, that the Writ to inquire of damages was taken before the Maior of *Plymouth*, who was also Judge of the Court, and for that cause reversed; for the Writ warrants the inquiry to be before the Serjeant of the Mace, who by the writ for that purpose is made a distinct Officer, and so an inquiry before the Maior is not warranted by any writ: And so by consequence a Judgment to recover those damages taxed before a wrong Officer to whom the Writ was not directed, is erroneous, which was granted by the whole Court.

*Judgment before a wrong Officer erroneous.*

**L** *Axworth versus West, Mich. 3. Jacobi.* Trespass brought for the taking of Hay severed from the ninth part of *Elthorp* in the County of *Warwick*, the Defendant to part pleads not guilty, and to the residue pleads a devise of the Parsonage made by *Lepworth* to the Defendant at *Wapenbury* in the same County, and to inable the devise for tithes in *L.* alleges *L.* to be a Hamlet in *Wapenbury*, to the intent that the whole Tithes may pass: and upon a *non devisavit*, the venn was of *Wapenbury*, and found for the Plaintiff, that *T. L.* did not devise it, and the other issue of not guilty found for the Defendant,

dant, and moved in Arrest of Judgment that the *venu* was mistaken, because it was of *Wapenbury* only, and not of *Elthorp*, and they of *W.* could not try a matter in *E.* And although it was answered, that the Defendant himself by his plea had confessed that *E.* was but an Hamlet, yet the Court held the *venu* mistaken; for when the Plaintiff declares of a Trespas in *E.* This by generall intendment is presumed to be a Village: of which Village the matter which is there in question ought to be tryed: and although the Defendant had alledged *Elthorp* to be but an Hamlet; yet it was but to inable the devise, and doth not extend to the issue before joyned upon the not guilty for part; for in that issue both parties agree that *Elthorp* is a Village, and it is a perfect issue taken, which hath not any coherence with the other issue of *non devisavit*: but if the Defendant had to the whole issue pleaded the devise as his excuse, and had alledged *E.* to be an Hamlet of *W.* and that only been in issue there, the *venu* awarded had been good of *W.* only; but in this case it was adjudged that the *venire* was mis-awarded, and that the Plaintiff should have a *venire facias de novo*.

The Court could not mitigate damages in trespasss which was locall.

**D***Elves* versus *Wyer*, Mich. 3. Jacobi. The Plaintiff brought an action of Trespasse for breaking his Close, and for cropping 200. Pear-trees, and 100. Apple-trees, and damage found to 40. l. And the Court was moved by *Richardson*, for that the damages might be mitigated, because he produced an *Affidavit*, whereby it appeared that the party himself before the Action brought, would have took 5 l. but denied; for the Court said, that they could not diminish the damages in Trespas which was locall, and therefore could not appear to them, and the damages might well amount to 40 l. for cropping of an Orchard, and so Judgment entred.

The Defendant justifies the imprisonment by the command of the Maior of London, and naught.

**W***oody's* case, Mich. 3. Jacobi. *Woody* brought an action of false imprisonment and Battery against two, who justifie and set forth that *London* is an ancient City, and that the Maior of *London* is a Justice of Peace, and that the Defendants were Serjeants of the Mace according to the custome of the City, and that the Lord Maior, to wit, one *Lee*, commanded them to arrest the Plaintiff for causes to them unknown, but to him known, and to imprison him, &c. *Walter* moved that this Justification was insufficient, because they only shewed that they were Serjeants at Mace duely elected according to the custome of the City; but do not shew the Custome and Authority that they have to make Serjeants, and to arrest, as it is 4. H. 4. 36. in trespasss the Defendant justifies, that the Tower of *London* is within the City of *London*, and time out of mind, &c. one Court was there used, &c. and that the Plaintiff was sued there by *J. S.* and that hee

was

was summoned : and upon a *nihil* returned , a *capias* issued according to the Custome, &c. And that he being an Officer there , did arrest : and the Court ruled him to plead the Custome particularly for holding the Court , and to prescribe, &c. And here it is shewn that the Maior is a Justice of Peace : And it doth not appear whether he did it as a Justice of Peace , or Maior , as 14. H. 7, 8. A Justice of Peace cannot command his servant to arrest one without a Warrant in writing in his absence. And *Popham* , chiefe Justice , said , That although the Judges knew the Authority of the Maior , by which they arrested men ; yet because it did not appear to them judicially as Judges, it must be pleaded : And a Justice of Peace cannot command his servant to arrest one if not in his presence, which was granted. And *Fennor*, Justice, said, that the servant is not an Officer to the Maior as he is a Justice of Peace, but the Constable : and *Walker* also added, that the Plea was , that the Maior commanded to imprison him presently without shewing any cause , which was held naught ; for the Maior ought to temper his Authority according to Law. For the Judges cannot imprison without shewing cause ; but them and the Maior both may command an Officer to arrest a man without shewing the cause, for else before he shall be examined he may invent and frame an excuse , and the accessories will flye away : And *Williams* , Justice, finds that it was incertain for the Plaintiff, by what authority he commanded it, whether as Maior or Justice of Peace : and his power as a Justice of Peace the Judges knew by common Law ; but his power as a Maior they knew not , if it be not shewed by pleading and Judgment.

*Just. of Peace cannot command his servant to arrest in his absence without warrant in writing.*

**H***Uggins* versus *Butcher*, *Trin. 4. Jac.* The Plaintiff declared that the Defendant such a day did assault and beat his Wife, of which she dyed such a day following to his damage 100 l. And Serjeant *Foster* moved that the Declaration was not good, because it was brought by the Plaintiff for a Battery done upon his Wife : And this being a personall wrong done unto the woman , is gone by her death : And if the woman had been in life , hee could not have brought it alone, but the woman must have joyned in the Action ; for the damages must be given for the wrong offered to the body of the woman, which was agreed. And *Tanfield* said, that if one beat the servant of *J. S.* so that he die of that beating , the Master shall not have an Action against the other for the battery and loss of service, because the servant dying of the extremity of the beating, it is now become an offence against the Crown , and turned into Felony , and this hath drowned the particular offence, and prevails over the wrong done to the Mr. before : And his action by that is gone , which *Fennor* and *Yelverton* agreed to.

*If a servant be beaten, & dye, the Mr. shall not have an action for the losse of his service.*

Declaration  
shall not a-  
bate for false  
Latin.

**B**rown versus Crowley, Pasch. 5. Jac. Action of Trespass brought against Crowley for wounding the Plaintiff upon the hinder part of the left legge, being rendred in Latin, *super posteriorem partem levis libai*, and the Jury found for the Plaintiff: And Harris moved in Arrest of Judgment; for hee said that these words (*levis libai*) made the Declaration vitious for the incertainty; for he said that *levis* signified light, and it was an improper word for left; and that judgment ought to be respited for the incertainty. And Yelverton argued that judgment ought to be given for the Plaintiff; for he said, the Declaration was not vitious; for if the Plaintiff had declared generally that he had wounded, broken, or evill intreated him, and had omitted those other words, it had been sufficient, and then the adding of those words which were not materiall, but for damages did not make the Declaration vitious: and he said, that *levis levis levis* was Latin for left: And whereas he hath said, that he strook him, *super posteriorem partem levis libai*, where it should have been (*levis libai*) it was but false Latin, and the Declaration shall not be made naught for false Latin. And Popham said, that hee shewing upon which part of the body the wound was, were laid only to incense damages; for the Declaration had been sufficient, though they had been omitted: And Justice Fennor agreed to Popham, and he said, it had been judged, that where a man brought an Action against another for calling him strong Theife: and the Jury only found that he called him Theife, but not strong Theif, yet the Plaintiff recovered; for this word strong was to no other purpose then to increase dammages, and Judgement was given for the Plaintiff.

A man cannot  
prescribe to be  
a Justice of the  
Peace.

**V**iccars versus Wharton, Pasch. 5. Jac. Viccars brought an action of false imprisonment against Wharton and others, and shews that he was imprisoned two dayes and two nights without meate or drink. The Defendants come and shew that King Edward the 1. by his Letters Patents did incorporate one Village in Nottingham-shire with Bailiffs and Burgessees, and that the King did ordain and make those Burgessees Justices of the Peace there; and that the Defendant was Bailiff, and a Justice of Peace there; and that the Plaintiff did speak divers opprobrious and contumelious words of the Defendant, by reason whereof they imprisoned him: And shews further, that the Bailiffs have used from the time of the making their Patent to imprison the disturbers of the Peace, and it was held a naughty plea, for a custome could not be shewn in such a manner: And Tanfield held in this case, that a man could not prescribe to be a Justice of peace; but Justice Williams held he might prescribe to be a conservator of the Peace. And Tanfield held that the King might grant that all the Burgessees and



and their Heires should be Burgessees, which Justice *Williams* denied.

**H** *All* versus *White*, *Pasch. 5. Jac.* An action of Trespass brought against the Defendant for impounding the Plaintiffs Cattel, the Defendant justifies for Common: And upon that they were at issue in *Derby-shire*, and the Jurors being sworn, the Bailiff found one *Bagshaw* one of the Jurors, rending of a Letter concerning the said cause, and shewed it to the Judg, and a verdict given by the Jury: And this matter moved in the then Kings Bench to quash the verdict, but denied by the whole Court, because the Letter and the Cause was not certified by the Postea, and made parcell of it; for otherwise the examination of that at the Barre after the verdict, shall never quash it. And so it was adjudged between *Vicary* and *Farthing*, 39. *Eliz.* where a Church Book was given in Evidence, of which you shall never have remedy except it be entred and made parcell of the Record.

*If a Book that ought not be given in evidence, the Court above cannot remedie it, except it be returned with the Postea.*

**B** *Utler* versus *Duckmonton*, *Trin. 5 Jacobi.* In Trespasse upon a speciall Verdict, the Case was, that no demised Land to a woman, if she should live sole and unmarried, the remainder to *John D.* bastard in Tail, the Remainder to the Defendant *Ro. Duckmonton* in Fee, the woman married with *Ro. D.* the Defendant the Term expired, *Jo. D.* Tenant in Tail, in remainder releases to the Husband, and whether this should alter the estate of the Husband, he being Tenant at sufferance was the question, and adjudged by the whole Court, that the Release was void, and it was cheifly void, because the Release was made to him in the Remainder to take effect, as upon the Remainder, and there was no privity, and he had but a bare possession, and no Freehold, and 10 *Eliz. Dier*, Lessee for years, surrenders, and afterwards the Lessor releases to him, and held a void Release for the reason aforesaid, and 31 and 32 *Eliz.* it hath been adjudged between *Allen* and *Hill*, where a Devise was made to the woman for life, if she would inhabite and continue in the house, and he went and inhabited in *Smrrev*, and the Heire released to her, and it was held void, because she was but Tenant at sufferance, and so no privity, but *Telverton* and *Tanfield*, that such estate for life was not determined without Entry, and *Telverton* Justice demanded, that when the Husband continued in possession after the Lease determined whether he should be in the Right of his Wife, and so remain Tenant at sufferance, whether he should be in his own Right, or be as an intruder, Disseisor, and then the release made to him was good, but no answer was given to him, but Judgement was given that the release was void, and *Fenner* put this Case, Tenant for life, remainder in Tail, remainder

*A release to Tenant at sufferance, void.*

remainder in Fee, he in the remainder in Fee released to Tenant for life, a void release, because of the mean remainder in Tail, and cited 30 E. 3. and no answer was given to it, and *Yelverton* said, that if Tenant for life release to him in the remainder in Fee, it is void, because it shall be void, as a surrender, and this word release, shall not recite as a surrender.

Commoner cannot chase the Lords Cattell, if the surcharge be Common.

**H**oldefden versus *Gresill Mich. 5 Jacobi*. An Action of Trespass brought for breaking the Plaintiffs Close called *B.* at *L.* and for taking of two Conies, the Defendant to the whole Trespass, but the entering in the Close pleads not guilty, and as to the Close justifies, because he Common in the Close called *B.* for five Cows, and because very many Conies were there feeding, and spoiling the Common, the Defendant in preservation of his Common entred to chase and kill the conies, to which the Plaintiff demurred in Law, and Judgment was given that the justification was naught, for a Commoner cannot enter to chase or kill the Conies, for although the owner of the Soil hath no property in the Conies, yet as long as they are in his Land he had the possession, which is good against the commoner, for if the Lord surcharge the common with Beasts, the commoner cannot chase them out, but the owner may distrain the Beasts of an estranger or damage feasant, or chase them out of the common, for the stranger hath no colour to have his Beasts there, and also conies are a matter of profit to the owner of the Soil for Housekeeping, and therefore because it appears that the cause of Entry was to chase, and also to kill, which are not lawfull, as against the Lord, who is Plaintiff, therefore the matter of the justification is not good, for if the Lord surcharge the Soil with conies, the commoner may have an Action of case against him for that particular damage, which is a sufficient remedy against the Plaintiff, upon a full and deliberate consideration of all the Judges.

The Statute of 13 Eliz. for non-residence a generall law.

**J**ennings versus *Haithwait, Mich. 5 Jacobi*. An Action of Trespass brought, to which the Defendant pleaded not guilty, the Jury found the Defendant Vicar of *D.* and that he such a day leased his vicaridge to *J.S.* for three years rendring rent, which *J.S.* assigned one Acre parcell thereof to the Plaintiff, and the Defendant was absent severall quarters in one year, to wit sixty dayes in every quarter, but they did not find the Statute of 13 Eliz. & adjudged for the Defendant, for the Statute of the 13 Eliz. is a generall Law, for although it extends but to those which have cure of Souls, yet in respect of the multiplicity of Parsonages and vicaridges in *England*, the Judges must take notice of it as a generall Law, and adjudge according to the said Statute, and so is the Statute of the 21 H.8. for non-residence.

*Drewry*

**D***Rewry* versus *Dennys*, *Mich. 5. Jacobi*, An Action of Trespass brought against a man and his Wife, and the Plaintiff declares, that they did beat one Mare of the Plaintiffs, and committed diverse other Trespases, and upon not guilty pleaded, the Jury found that the Woman beat the Mare, and for the residue they found for the Defendant, and the Verdict adjudged naught by the Court, for it is altogether imperfect, for they have found the Woman guilty of the beating the Mare, and have given no Verdict concerning that for the Husband, either by way of acquittall or condemnation; and the finding the Defendant not guilty, as to the residue, doth only extend to the other Trespases contained in the Declaration, and not to the beating of the Mare: And *Williams* and *Cooke* Justices said, that where a Battery is brought against Husband and Wife, supposing that they both beat the Plaintiff or the Mare of the Plaintiff, and upon not guilty pleaded, it is found that the Woman onely made the Battery and not the Husband, this Verdict is against the Plaintiff, for it now appears that the Plaintiffs Action was false, for the Husband in this case shall not be joyned for conformity onely, and there is a speciall Writ in the Register for this purpose, and is not like a Battery charged upon *I. D.* and *I. S.* for there one may be acquitted and another found guilty, and good, because they are in Law severall Trespases.

*Where Husband and wife shall be joyned, and where severed in Action.*

**S***ands* and others, versus *Scullard* and others, *Mich. 5. Jacobi*. The Plaintiffs brought an Action of Trespass against the Defendants for entering their Close; and Judgement was entred against *Dawby* one of the Defendants, by *nil dicit*, *Scullard* pleaded not guilty, whereupon a *Venire facias* was awarded upon the Roll between the parties, as well to try the Issue, as to inquire of the damages: And the Plaintiffs took their *Venire facias* to try the Issue between the two Defendants, and the two Plaintiffs: And according to that was the *Habeas Corpus*, and *Distringas*, but the Plaintiffs knowing *Dawby* to be dead, took their Record of *Nisi prius* against *Scullard* onely; and he was found guilty: And *Telverton* moved in Arrest of Judgement, and shewed the *Venire facias*, and that there was no Issue joyned between the Plaintiffs and *Dawby*, for Judgment was given against him by *Nil dicit*; and the Writ ought to have made mention onely of the Issue between the Plaintiffs and *Scullard*: And their ought to have been an inquiry of damages between the Plaintiffs and *Dawby*, according to the Award upon the Roll, which is the warrant for the *Venire facias*; and it was shewed that the Jury knew nothing of the matter for which they were warned, for they ought to have onely given their Verdict against *Scullard* and not against *Dawby*; and it was

*The Venire facias vicious, no damages in Partition.*

likened where two matters are in Issue, and they give a Verdict for one and nothing for the other, it is naught for all: And this was the opinion of the whole Court except Justice *Williams*, who relyed upon 9. *Eliz. Dyer*, Sir *Anthony Cook*, and *Wattons Case* in partition against two, one confessed the Action, and the other pleaded to Issue, and the *Venire facias* was to try the Issue between the Plaintiffs and the two Defendants, and it was amended by the opinion of the Court: But marke the difference, for no damages are to be recovered in partition, but it is otherwise in Trespass; and therefore in *Cooks Case* it was found by the Court, that it was as if a meer stranger to the Record had been named in the *Venire facias*.

If the Jury find a man guilty in Trespass for a foot, where it is layd in an Acre, good enough, and so in all Actions where damages onely are to be recovered.

**W***ickworth* against *Man*, *Mich. 5. Jacobi*. The Plaintiff declares for a Trespass in one Acre of Land in *D.* and abuts that, East, West, North, and South; and upon not guilty pleaded, the Jury found the Defendant guilty in halfe an Acre within written; and moved in Arrest of Judgment, because upon the matter no Trespass had been found, for there is no such moiety bounded as the Plaintiff had declared, for the whole Acre is onely bounded by the Plaintiff, containing his Trespass within those bounds, and the Defendant ought to be found a Trespasser within those bounds, for otherwise it is not good; and it is impossible for the moiety of one Acre to be within those bounds: But the whole Court except *Fenner*, were of opinion that the Plaintiff should have his Judgement; for if the Plaintiff layeth his Action for a Trespass committed in one Acre, and the Jury find that onely to be in one foot of it, it is good; and here they have found the Trespass in the moiety of the Acre bounded, which is sufficient in this Action, where damages onely are to be recovered, but if it had been in Ejectment, the Verdict had been naught, for it is incertaine in what part he should have his Writ of *Habere facias possessionem*.

**B***uckwood* against *Beale*, *Mich. 5. Jacobi*. In an action of Trespass it was sayd by the Court, That if a Sheriff execute a *Capias*, and there is no Originall to warrant it, he is excused it, for he is not to examine whether the Originall be sued out or no; and for this *Trewymards Case*, 38 *H. 8.* And so if a Bailiff execute a Process made to him by the Steward for damages recovered in the Mannor in a thing in which they had no authority to hold Plea: The Bailiff is excused, and shall not be punished, because he is not to examine the jurisdiction of the Court, 7 *H. 4.* 27. 22 *Ed. 3.* & 22. *Ass.* But if Process come to the Sheriff to arrest *J. S.* and he arrest *J. N.* or to make execution of the Goods of *J. S.* and he make execution of the Goods of *I. N.* he is a Trespasser; for in this Case he must take notice

Nota.

tice at his perill of the Person and the Goods, for when he arrests *I. N.* or does execution upon his Goods, he doth it without warrant : And so if *I. S.* sue a Replevin to the Sheriff to replevin his Cattell, and *I. S.* comes to the Sheriff, and shews him the Cattell of *I. N.* and saith they are his Cattell, and he makes replevin of the Cattell, he is a Trespassor to *I. N.* and the Sheriff may have an Action of Trespass against *I. S.* for his false information, for the Sheriff must at his owne perill take notice whose Cattell they be, 3 *H.* 7. 14 *H.* 4. but if there be any fraud in the matter he may aver that.

**M**onrey versus *Johnson*, An Action of Trespass brought for entering into a mans House, The Defendant pleads that he was a Constable, &c. And it was held by the whole Court that a Constable may justifie his entry into the House of any man for Felony or Treason.

**S**trickland against *Thorpe*, Pasch. 6. *Jacobi*. *Thorpe* brought an Action of Trespass against *Strickland*, wherefore he broke his close the 20. of *June* 3 *Jacobi*, with a continuance thereof untill the sixth of *November* after ; and upon a not guilty pleaded, it was found for the Plaintiff and Judgment entred, but it was entred nothing of the Fine because it is pardoned : And upon a Writ of Errour brought he assigned for Errour that the Judgment should have been entred with a *Capiatur*, because the King and Parliament pardoned all offences before the 25. of *September*, and therefore the Trespass being alleadged to have been continued untill the sixth of *November* following, onely part of the Trespass was pardoned ; and therefore, as to that it should have been a *Capiatur* ; but the whole Court were of opinion that the Judgment was well entred for the first Trespass, which was by force and Armes being pardoned, all that depends on that was pardoned, and the continuance of the Trespass being onely as to the entering and consuming the Grasse is for increase of damages onely, but not for the Kings Fine, for the first entry being only with force and Arms makes the Trespass.

*Error assigned because in trespass nothing was entred of the Fine, &c. where it was a continued trespass, and part of it was layd to be after the Pardon.*

**R**epps against *Bonham*, Trin. 6. *Jacobi*, The Case in Trespass was that a Feofment was made of three Acres to *R. Repps* and *Mary* his Wife for their lives, and afterwards to the first, second, and third Son of the body of the sayd *Mary*; and after to the heirs of the body of the said *Mary* by the said *Richard* to be begotten, and they had no Son but one Daughter : *Richard* levies a Fine of the Land, and *Mary* dyes, the Plaintiff enters, and the Defendant pleads *Richards* Fine, and adjudged that the Plaintiff is not barred by the Fine, for *Richard* had onely an Estate for life, and the Estate tayle was in the



woman only by the opinion of the five Justices; for they said that the Husband is only named to declare what heir of the body of the woman should inherit: and not any Heir, but such an Heir as *Richard* her present Husband should beget. And if the limitation had been to the Heirs of the body of the woman by her Husband, and by *I. S.* to be begotten, the Inheritance had been only in the woman, but by the last words; for if shee had no Heirs by her Husband, and afterwards marries *I. S.* the Heirs that shee should have by *I. S.* should inherit: And they were all of opinion, that the Inheritance was only in the woman, because the word Heir which makes the estate of inheritance, is annexed only to the body of the woman: but if it had been to the Heirs which the Husband should have got of the body of the woman, there the intaile had been in both, *19. H. 6. 75.* And the like Law, if it had been to the Heirs which the Husband should beget of the body of the woman, *Little. 82. 6.*

Nota.

**H**orn against *Widlake*, *Mich. 6. Jac.* An action of Trespass brought wherefore he broke his Close, and spoiled his Grass in *D.* The Defendant pleads, that in the Close wherein the Plaintiff supposes the Trespass to be done time out of mind, there hath been a foot-way for all people passing in, by, and through the said Close untill such a day, and that such a day the Plaintiff plowed up the said Foot-way, and sowed it with Corn, and laid thorns on the sides of it: And further pleads, that in the said Close, neer the said ancient Foot-way, the Plaintiff, before the Trespass supposed to be committed, left, and set out another Foot-way for all people who would use that new way; which way, since it was laid forth, hath been used by all Foot-passengers; by reason whereof, the Defendant the time in which, &c. went in the way so laid forth unto such a place, &c. which is the same trespass, &c. and demands judgment, &c. and the Plaintiff demurs, and adjudged against the Plaintiff, because the Plaintiff made the first wrong in stopping up the ancient way, and had assigned a new way for passengers: And therefore the Defendants plea is good by way of excuse as to the Plaintiff; for it is not fit he should punish the Defendant against his own agreement. As if there were a Foot-way through the Close of *I. S.* over an hedg, and I should remove the hedg into a new place, if passengers in using their way goe over the hedg where it is newly placed and fixed, they shall not be punished for that; for it arises of the Act and wrong of the Plaintiff himselfe: and *volenti non fit injuria*: As if water run by the Land of *M.* and *M.* stop the water-course, so that it surround my ground; if now abate this, hee shall not have an action against me for entring into his Close, because the stoppage was his own Act, and the same law in the principall case. And although the Defendant hath pleaded generally, that the Plaintiff

Plaintiff hath set out a way, and shews not where it is, is not materiall; for that which is common to all cannot be assigned to any particular person, which was the opinion of the whole Court, except Justice *Yelverton*.

**M***Etiam* versus *Barker*, *Mich. 6. Jacobi*. An action of Trespass brought, for that the Defendant the first of *August*, in the fifth year, the Plaintiffs Close at *L.* in the County of *Suffolke*, hath broken, and entred, and spoiled his Grasse with his Cattel, &c. The Defendant pleads, that in the time when the Trespass, &c. the freehold of the Land where, &c. was in Sir *Jo. T.* And that the Defendant as servant, and by his commandement, hath entred, and put in his Cattel. The Plaintiff replied, that true it was, that the Freehold was in Sir *John T.* But said, that a long time before the Trespass, &c. Sir *John* leased the Close to the Plaintiff at will, by reason whereof he entred, and was possessed untill the Defendant did the Trespass, and traverses without that, that the Defendant by the command of Sir *Jo.* entred, and put in his Cattel; and the Defendant demurred, and adjudged against the Plaintiff, for the plea in Barre is good, and in no wise avoided by the Replication; for the Replication must be good only by way of Title: And the Plaintiff doth not intitle himselfe to any good Lease at will; for he doth not alledg indeed any Seisin in Sir *John*; or any possession in him, out of which a Lease at will may be derived. And although a Declaration may be good to a common intent, and in debt upon a Lease, as 21. *H. 7.* is, the Plaintiff may declare that he devised. And need not alledg a seisin in himself, when he made the Lease, &c. Yet when a title is made by Barre or Replication, as 2 *E. 4. 9.* is, that ought to be certain to all intents, because it is traversable, and because the Defendant had made a good Justification in Law, that ought to be answered by the Plaintiff with a good title, to wit, that Sir *I. T.* was seised, and made a Lease to him at will, which is not so done; but it is all one, as if he should have replied, that *Robin-Hood* in *Barnwood* stood, without that by the command of Sir *John*, &c. which observe. And this by the opinion of *Fennor*, *Williams*, and *Cook*, being only then in Court, and Judgment was given accordingly.

Nota.

**G**oodman against *Ayling*, *Mich. 6. Jac.* An action of Trespass brought, that the Defendant the 8. of *February*, 4. *Jacobi*. broke the Plaintiffs house, and took and carried away one Brasse Chafer of the Plaintiffs, price, 20 s. The Defendant pleads that the house is parcell of halfe a yard Land in *P.* and that it was holden of *H. Earl of North*, as of his Mannor of *W.* by homage, fealty, escuage, incertain suit of Court, inclosure of the Park-pale, & rent one pound of Comyn, and

*If the verdict find the tenure in substance, though not in manner and form, it is good in trespassse.*

Difference between Replevin and Trespass.

and for the Rent behind for three years, and the homage and fealty of *Th. P.* Tenant thereof; the Defendant as servant of the Earl, and by his command, justified the Entry, and taking, &c. The Plaintiff replies, that the house was held of *R. Stanley*, as of his Mannor of *Lee*, without that, that it was held of the Earl in manner and form, and upon this they were at issue, and the Jury found it was held of the Earl, as of his Mannor of *P.* by homage fealty, inclosure of the pale rent of a pound of Comyn, and no otherwise. And if it seemed to the Court that it was not held in manner and form, they found for the Plaintiff, &c. And adjudged for the Defendant, for although the verdict did not agree with the plea in manner and form of the tenure, yet it agreed in substance in the point, for which the taking was, to wit, that the Land was holden of the Earl, and that suffices; for there is difference between a Replevin and Trespass: For in Replevin, because the Avowant is to have return, it behoves the Avowant to make a good Title in all things, but otherwise it is in Trespass; for there the Defendant is bound only to excuse the Trespass, and therefore if there be any tenure it suffices; for if the Lord or Bayliffe in his right distrains for that which is not due, yet he shall not be punished in Trespass, as *Littleton*, 114. for the manner and form: And 9. *H.* 7. which mark by the whole Court: and *Fleming*, Justice vouched the 33, *H.* 8. *Dyer* 48. *B.* where the issue was, whether a Villain regardant, &c. or free: And the Jury found a Villain in grosse, yet it was held good for the substance of the Villianage, and of the issue were found, *H.* 5. *fac. rotulo*, 834.

In a writ to enquire of damages, the Plaintiff is not bound to prove the property of goods, but the value only.

**G**oodwin against *Welsh* and *Over*, *Pasch.* 7. *Jacobi*. The Plaintiff brought an Action of Trespass for severall things against the two Defendants, and declares to his damage, &c. The Attorney for the Defendants, pleads *non sum informat*, and thereupon Judgment was given severally for the Plaintiff, and Writs to inquire of the damages issued out, and were returned: and it was moved, that the Writs should not be filed, because the Plaintiff at the time of the inquiry did not prove that the goods did appertain to him, but only proved the value of the goods; for Serjeant *Nichols* took a difference between an Action confessed, and *non sum informat*; for in the first case the property of the goods is also confessed to be in the Plaintiff, but it is not so in the other case: for here Judgment passes without the privity of the Defendant, and only for want of pleading, as in the case of a *nil dicit*, but by the whole Court it was all one. And the Plaintiff is not bound to prove the property in any of the Cases: and the reason is, because the Writ commands only the value to be inquired of, and no more, and that only is the charge of the Jury: And the whole Court were of opinion, that they themselves as Judges, if they

they would in such Case might assesse Damages without any Writ, if they would trouble themselves, for the Writ goes onely, because it is known what Damages are, but it is otherwise, when not guilty is pleaded, for then the Trespass is denyed, which must be proved and tryed by the Jury, and there both the value and property come in proof; and observe, the Judgement is, that he should recover, and if upon a Writ of inquiry he should be bound to prove the property, and fail thereof, it would be in destruction of the first Judgement which cannot b. observe this.

**T**ailor against *Markham, Trin. 7 Jacobi.* An Action of Trespass and Battery brought for, &c. The Defendant pleads, that he at the time of, &c. was seised of the Rectory of, &c. where the Battery was supposed in Fee, and that at the time in which, &c. Corn was severed from the nine parts at the place aforesaid, and because the Plaintiff came to carry away his corn, and the Defendant stood there in defence of his corn, and keeping the Plaintiff from taking it away, and the hurt that the Plaintiff had, was of his own wrong, &c. the Plaintiff replies, that it was of his own wrong with the such cause alledge, &c. and the Defendant demurred in Law, and adjudged for the Plaintiff, for that generall replication is good, and doth not behove the Plaintiff to answer the Defendants Title, because the Plaintiff by his Action doth not claim any thing in the Soil or corn, but only damage for the Battery, which is altogether collaterall to the Title, but when the Plaintiff makes a Title by his Declaration to anything, and the Defendant shall plead another thing in destruction thereof, or if the cause of Action in such Cases, the Plaintiff must reply specially, and not say without such cause, as it is in 14 H. 4. Trespass brought for taking a servant, the Defendant shews that the Father of him that the Plaintiff supposes to be the servant, held of him in Knights Service, &c. and died seised his Heire, the Servant being within age, by reason whereof he seised as his Ward, as it was lawfull for him to do, and there the Plaintiff replied that he did it of his own wrong, and without such cause, and disallowed by the Court, because he did not answer to the Seigniorie, to wit, that he did that of his own wrong, without it, that the Father of him, that is, supposed to be the Servant, held of him in Chivalry, and the reason was, because the plaintiff by his Action made Title to the Servant, according to 16 E. 4. and Judgement given accordingly.

*where of his own wrong without such cause shall be a good issue and where not.*

**A**lbon against *Dremfall, Mich. 7 Jacobi.* The plaintiff declares in an Action of Trespass, that the Defendant the twentieth day of February, 5 Jac. did break the plaintiffs Close, at &c. called *Sandy Heath*, and entered it, and spoiled his grasse, and killed took and carried

*The Defendant prescribed for a passage over Land, and naught, it should have been for a way.*

ried away a hundred Conies, and also that the Defendant the same day the free Warren of the plaintiff at *Sandy* aforesaid did enter, and chase without license, and killed fifty Conies, and took & carried them away to his damage of, &c. the Defendant to the whole Trespasse, except the entring and breaking of the Close called *Sandy Heath*, not guiltily, and in Issue joyned upon that, and as to the breaking the Close the plaintiff ought not to have his Action, for he said, that *William Lord Russell*, and *Elizabeth* his Wife, were, and yet are seised in Fee, in the Right of his Wife, in a certain peice of Heath, containing ten acres in *Sandy* close adjoining, & on every side separated from the place called *Sandy Heath* & that they, and all those whose Estate they have in part, in that peice of Heath, have used to have for themselves and Farmers of the said peice of Heath, and for their Servants a passage unto the said peice of Heath, and from the said peice, in, by, and through the said Close called *Sandy Heath*, in which, &c. the whole year at their pleasure to take and receive the profits of the said peice of Heath, and the Defendant further sayes, that long before the Trespass supposed to be committed, very many Conies were wandering in the said peice of Heath, and divers Cony holes were there made, in which the said Conies did delight to live in, and at the time in which, &c. they were in the said peice of Heath, eating the grasse growing there, and the Defendant, as Servant to the Lord *Russell*, and by his command, the time in which, &c. in, by, and through, the said Close, in which, &c. towards, and unto the said peice of Heath, did walk over to hunt, and take the said Conies, in the said peice of Heath, then being and feeding, as it was lawfull for him to do, which walking in, by, and through the said Close, in which, &c. for the cause aforesaid, is the same breaking the Close, and entring thereof, whereof the Plaintiff complains, and averres that the place by which the Defendant walked for the cause aforesaid to *Sandy Heath*, in which, &c. was the next passage, by which he could go to the said peice of Heath; to which the Plaintiff demurres; and adjudged for the Plaintiff, for a passage, is properly a passage over the water, and not over Land, and the Defendant ought to have prescribed for the way, and not for the passage, for he ought to have observed the usuall words, and such as are known in the Law for a prescription, and usage is for a way, and not for a passage, and see 32 *Affs.* 58. and 11 *H.* 4:82.b. Secondly, the prescription is not good, because he doth not shew from what place, nor to what place the passage or way is, for although a way be in grosse, yet it ought to be bounded, and circumscribed to some certain place, especially when it appears to ly in usage, time out of mind, for that ought to be in a place certain, and not in one place to day, and another to morrow, but constant and perpetuall in one place. Thirdly, the Plea in Barr is not good, because



cause he doth not shew what manner of passage it was, whether a Foot-way, or Horse-way, or Cart-way, and therefore it is altogether incertain, and Judgement given accordingly.

**T***Roughton* against *Gouge*, Mich. 7 *Jacobi*. An Action of Trespas brought, for entring into the Plaintiffs Close, called *Wild Marsh*, and for mowing and cutting five Loads of hay, to his damage of, &c. the Defendant saith, that the Close aforesaid did contain twelve Acres, whereof a long time before the Trespas done, and at the time the Mayor of, &c. of *Lincoln* were seised in Fee, and being so seised, Leased it to the Defendant for years before the Trespas committed, by reason whereof he entred and was possessed untill the Plaintiff claimed by Deed of the Maior, &c. for life, whereas nothing passed and entered, and the Defendant the time aforesaid re-entred as it was Lawfull for him to do, the Plaintiff replied, that the Close in which the Trespas is supposed to be done, contained one Acre, and three Roods, and abutts it East, West, North, and South, and one of the abutnals were upon the twelve Acres mentioned in the plea in Barr, and concludes it is another Close, the Close mentioned in the Plea in Barr, containing twelve Acres, whereupon the Defendant demurres, and the Court were of opinion at the first opening the matter, that the replication was not good, because it answers not to the matter supposed in the Barr, for when the Plaintiff in his Declaration gives the place a certain name as he hath, and the Defendant by his Plea in Barr agrees, the place as here he doth, to wit that the Close aforesaid, to wit, *Wild Marsh*, is the inheritance of the Mayor, &c. and he as Lessee to them for years makes a Title to himself, the plaintiff ought to answer to the Title, or avoid it, which he doth not by his replication, for the plaintiff by that endeavors to assign a new place, which he cannot do when they are agreed of a place before, and therefore he ought to have pleaded, that there were two Closes called *Wild Marsh*, the one containing twelve Acres, as the Defendant had alledged, and the other containing one Acre, and three roods, whereof the Plaintiff was seised, and that the Close where the Plaintiff supposed the Trespas to be committed, and the close called *Wild Marsh*, contained one Acre, and three roods, which mark: and see 21 E. 4.

Nota.

**L***ee* against *Atkinson* and *Brooks*, Hill. 7. *Jacobi*. An Action of Battery brought against the Defendants at *London* for assaulting the Plaintiff, to wit, in such a Parish and Ward, and beate, wounded, and evil intreated him, to his damage of an hundred pounds; the Defendant as to the force pleads not guilty, and as to the residue, that *Atkinson* the time in which, &c. at *Gravesend* in the County of *Kent*

was possessed of a Gelding, and being so thereof possessed, the Plaintiff the time in which, &c. at *Gravesend*, &c. came to the Defendant to hire the Gelding for foure shillings for two dayes, in which the Plaintiff would ride from *Gravesend* aforesaid to *Nettlebed* in the same County, and from thence to *Gravesend* within the sayd two dayes, by reason whereof the Defendant for the consideration aforesayd, the time in which, &c. lent the Gelding to the Plaintiff, who had it, and in a direct line rode for the space of a mile to *Nettlebed* aforesaid upon the Gelding, untill the Plaintiff, the time when, &c. intending to deceive the Defendant of his sayd Gelding, went forth of his way to *N.* and rode towards *London*, by reason whereof, *Atkinson* in his owne right, and *Brook* as his servant, came to the Plaintiff, and at the same time in which, &c. required the Plaintiff then riding upon the sayd Gelding towards *London*, to deliver the Gelding, which he refused to doe, by reason whereof *Atkinson* in his owne right, and *Brook* as his servant, and by his command the time in which, &c. to repossess himselfe of the sayd Gelding, layd hands upon the Plaintiff and took him from the Horse back, and would have taken the Gelding from the Plaintiff, by reason whereof the Plaintiff did by force and Armes assault the Defendant, and by strong hand kept the Gelding, by reason whereof the Defendant did defend the possession of the Horse against the Plaintiff, as it was lawfull for him to doe: And further say, that if any damage hapned to the Plaintiff, it was of his owne assault, and in defence of the possession of the Gelding, and Traverses that he was not guilty in *London*, or any where else out of *Kent*, &c. and the Plaintiff demurs, and adjudged for the Plaintiff, for the Battery is confessed and did arise from the evill behaviour of the Defendant, for it appeared by their owne Plea in barr, that the Plaintiff had hyred the Gelding for two dayes, and that they within these two dayes disturbe the Plaintiff of his possession of the Horse, and thrust him off his back, which was not lawfull, for the Plaintiff had a good speciall property for the two dayes against all the World; and although the Defendant pretends that the Plaintiff had misbehaved himselfe in riding to another place then was intended, yet that was to be punished by an Action of the Case, but not to seise the Horse: Which observe.

**K** *Nieveton* against *Royle*, *Mich. 8. Jacobi*. An Action of Trespass brought for breaking the Plaintiffs Close called *G.* in *Woodthorpe* in the County of *Derby*, to the damage of, &c. The Defendant pleads that the Close was known as well by the name of *G.* as by the name of *D.* And that it was and had been, time out of minde, parcell of the *Wigenworth*, and pleads his freehold in the Mannour: The Plaintiff maintaines his Declaration, and traverses that the place where,

where, &c. was not parcell of the Mannor, and upon this they are at Issue, and a *Venire facias* awarded of *Woodthorpe* onely, and moved in Arrest of Judgment by the Defendant, the Verdict being for the Plaintiff, and urged that it was a mistryall, for the *Venire facias* ought to have been as well of the Mannor as of *Woodthorpe*, for although the parties be agreed, that the place where the Trespass was committed lyes in *Woodthorpe*, yet that being supposed indeed to be parcell of the Mannor of *Wigenworth*, the Venu of the Mannor by intendment have a more perfect and better knowledge of it then the Villiage of *Woodthorpe* onely, which was granted by the whole Court, and a new *Venire* awarded to try the Issue anew.

**D**owglas against Kendall, Mich. 8. Jacobi. The Plaintiff declared, that the Defendant the 21. of January, 6. Jac. by force and Arms thirty Loads of Thornes of the Plaintiffs ready to be carryed, in a place called the Common wast at *Chipping-warden* in the County of *Norfolk*, did take and carry away, to the Plaintiffs damage of ten pounds, the Defendant pleaded not guilty to all but to ten Loads; and as to them that the place where, &c. contained one Acre of pasture, and that one *William Palmer* was seised in fee of a Messuage and three quarters of a yard Land in C. aforesayd, and that he and those whose estate he had in the sayd Messuage, &c. time out of minde, were used to have for their farmers, &c. all the Thornes growing upon the sayd Acre of pasture to their use to be imployed and spent upon the sayd Messuage, &c. as appurtenant thereunto; and the sayd ten Loads were growing and unjustly cast downe by the Plaintiff upon the sayd Acre of wast, and being ready for them to carry, the Defendant as servant to *Palmer*, and by his command, took them and carryed them away and imployed them upon the House, as it was lawfull for him to doe; the Plaintiff by protestation that *Palmer* and such, &c. time out of minde, had not the Thornes growing upon the sayd Acre of pasture parcell of the wast, and that Sir *Richard Saltonstall* was seised of the Mannor of *Chipping-warden*, whereof the common wast was parcell in fee; and that he the 21. of January, the sixth yeare of K. James, granted license to the Plaintiff to cut and carry away thirty Loads of Thornes mentioned in the Plea in barr growing upon the Wast, by reason whereof they cut those ten Loads of Thornes, growing upon the wasts, and they were ready to be carryed, by reason whereof they were possessed thereof untill the Defendants took them away; and upon this Replication the Defendants demurred; and adjudged against the Plaintiff, and there was a differance taken by the Court, where a man claimes reasonable Estovers in anothers Soyle, and where a man claimes all the Thornes in anothers Soyle, for in the first case if the Owner of the Soyle shall

*If the Lord cut the Wood in which the Commoner hath Estovers, he shall have an Action of the Case, but not an Assise.*

cut downe the Thorns first, he that hath title to the Estovers cannot take them, for the property and interest of all the Thorns continues in the Owner of the Soyle, and the other hath onely Common there, and if the Owner of the Soyle cut them downe all, he that should have the Estovers shall have an Action upon the Case onely, and not an Assise, for when all the Wood is destroyed it cannot be put in seisin, as the Abridgement of the Assise is, fol. 21. And so it appeares by Sir Thomas Palmers Case, Co. lib. 5. fol. 25. And if one grant an hundred Cords of Wood to be taken at the election of the Grantee, and the Grantor or an Estranger cut downe the Wood, the Grantee cannot take the Wood but must supply his Grant out of the residue, for the Grantee hath but an especiall interest in part of the Wood and not in all, but now in this Case the Defendant in right of Palmer claimes all the Thorns, in the name of all the Thornes growing upon the sayd Acre of pasture, and if he hath all, Sir Richard S. cannot have any, and so by consequence cannot license the Plaintiff to cut any; and so the whole interest is in Palmer, and it is not in the nature of Estovers, for Estovers is but parcell of the Wood, and that to be taken to a speciall purpose; and in this case it was agreed, that although the Defendant had alledged an imployment of the Estovers, yet since the Defendant had claimed all the Thornes and Trees, the imployment is not traversable, for he that hath the generall interest and property in Trees by custome or prescription, cannot be restrained but may use them at his pleasure; And see 10 E. 2. 2. and adjudged accordingly.

**M**Assam against Hunt, Mich. 6. Jacobi. A Copy-holder of a Messuage and two Acres in fee. The Lord grants and confirms the Messuage and Lands with the appurtenances to the Copy-holder in fee: and whether he to whom the confirmation was made shall have by the usage as a Copy-holder common in the wafts of the Lord, was the question, and adjudged he should not; for the Copy-holder by that confirmation is extinct and infranchiz'd, for the words, with the appurtenances will not create a common; for at first the Common was gained by custome, and annexed to the customary estate, and is lost and perished with that; for Common of its own proper nature is incident to a Copy-hold Estate.

Nota.

**F**Armer against Hunt. Hilar. 8. Jacobi. An Action of Trespasse brought for chasing the Plaintiffs Cattle in such a Close; the Defendant justifies taking damage fasant in his Free-hold: The Plaintiff replies, and shewes one grant of Common in the place where, &c. by the Defendant to the Plaintiff, and that afterwards the Defendant had erected a reek of Corn, and the Plaintiff put in his Beasts to use

use his Common, and the Defendant chased them: But note, that the Plaintiff in his replication in pleading the grant of the Common by Indenture, did omit the bringing it into Court. And by all the Judges the chasing of the Cattell by the Defendant is not lawfull, for by such means he may defeat his own grant; for by the grant of common in such a place, the Grantee may use the whole Common: And then when the Grantor erects a Reek of Hay upon part of the Common he had granted, he will diminish the Common, and tend to the enfeebling of his Grant, which ought not to be; for the Beast ought to range over the whole place, and eat the Hay without doing any wrong; for the wrong did first begin in the Grantor, who is the Defendant, of which he shall never take advantage. And whereas he hath erected one Reek of Corn, hee may erect twenty, and so the Beasts shall have no liberty of pasture there; but because the Plaintiff did not shew to the Court the Indenture of the Grant, which is the ground of his title; for that very cause judgment was given against the Plaintiff.

Nota.

**D**urant against *Child, Hillar. 9. Jaco.* An Action of Trespasse brought for chasing the Cattell of the Plaintiff, and shews what Cattell, and that the Trespasse was done at *B.* to his damage of, &c. The Defendant justifies the chasing in one Close called *M.* in *B.* which is his Free-hold, and that the Cattell were there damage feasant. The Plaintiff replies and shews, that one *B.* is seised of one Close called *Catley* in *D.* in fee, and made a Lease thereof to the Plaintiff for years: and that the Defendant is seised of one Close called *Furfey* in Fee, which lies next adjoyning to the Close called *Catley*; and that the Defendant, and all those whose Estate he hath in *Furfey* Close, have used time out of mind to repair the Fence and Hedges between *Catley* Close & *Furfey* Close, which *Furfey* Close doth next adjoin to the Close called *M.* where the Cattell were chased, and shews that the Plaintiff put his Cattell in *Catley* Close to feed the Grasse there, which by default of inclosure escaped into *Furfey* Close as above; but he said that between *Catley* Close and *Furfey* Close, there is a little Brook; which Brook at the side of *Catley* Close had a banck next adjoyning to it; which banck the Lessor of the Plaintiff, and those whose Estate they have, &c. have used time out of mind, &c. to repair. And that the Brook at the side of *Furfey* Close had another Brook next adjoyning, which the Defendant used to repair, and shews because the Plaintiff had not repaired the banck; on the side of *Catley* Close the Cattell did escape into *Furfey* Close, and stayed in the Close called *M.* By reason whereof the Defendant chased them, as it was lawfull for him to doe; whereupon the Plaintiff demurres, and adjudged for the Plaintiff; for the Defendant had pleaded a good Barre, and the Plaintiff

Nota.



Plaintif had replied a good replication, and had removed the fault from himselfe, and laid it upon the Defendant by his negligent inclosure between *Catley* and *Furfey*: and the rejoinder doth not confess and avoid the replication, but perplexes the matter by adding one point of prescription on the Plaintiffs part, that he ought to repair one bank between *Catley* and *Furfey*, upon which an issue could not be taken, for then two prescriptions should be an issue together, which cannot be, no more then two affirmatives, as the 5. *H.* 7. 12. And also the matter contained in the Records doth not answer the matter contained in the Replication, but by way of Argument only: And whether that be true, is no matter in evidence against the Plaintiff, who is bound to prove his Replication true. For the Plaintiff saith, that *Catley* and *Furfey* doe lye together, that is, without any space between them. And the Defendant in his Rejoinder saith, there is a bank between *Catley* and *Furfey*, which if it be so they do not lye together: but the Defendant ought to have traversed the prescription alledged by the Plaintiff, which had made an end of all the matter, which observe was by the opinion of the whole Court.

An action will not lie for the counter-part of an Indenture without a speciall grant.

*S*utcliffe against *Constable*, *Trin.* 10. *fac.* *Ch.* *Constable* 32. *Eliz.* was seised in fee of the Mannor of *East-hatfield* in the County of *Yorke*: and by his Indenture infeoffes *H. Remingham*, paying for certain Lands parcell of the Mannor, 60 l. at two Feasts, with a clause of Distresse, if it be behind by the space of 14. days. *Ch.* 43. *Elizab.* by Indenture bargains and sells the 60 l. Rent to the Plaintiff, which was inrolled, by reason whereof he was seised of the Rent for the life of *Ch.* and being so seised, loses that part of the Indenture sealed by *Remingham*; which the said day, to wit, the 24. *Novemb.* 44. *Eliz.* came to the hands of the Defendant, who by Force and Armes tearred the seale of the Indenture against the Peace, &c. to his damage of 400 l. The Defendant pleads that *Ch.* hath not granted the Mannor of *E.* to *Remingham*, paying the rent, &c. in manner and form, and the Plaintiff demurres upon this Plea: And it was argued that the Bar was good, which is a direct traverse to the title of the Plaintiff, to destroy the ground of the Plaintiffs action; for if no rent were granted, then the Indenture concerning which the Plaintiff complains, did not belong to the Plaintiff; for it passes not to the Plaintiff, but as an incident to the second Grant, of necessity to make good his title: As the Lord *Buckhursts* Case, *Co.* 1. & 7. *E.* 4. 30. in assize of rent, the Plaintiff made his title by deed of a rent charge, it was a good plea to say that nothing passed by the grant, because the issue is taken upon the speciall matter, and not the generall; but in an Assize brought of an Office, it is no plea to say there is no such Office, for that amounts to no more but that he hath not disseised him, 45. *E.* 3. In trespasses  
for

for taking away of writing, it is no plea to say that he never had such a writing, but must plead not guilty: So in an Action of Trespass for Goods, it is no Plea to say, that the property of them was to an Estranger, and not to the Plaintiff, because by that plea hee denies not but that the Plaintiff was in possession, which is sufficient to maintain the Action, 20. H. 8. 28. which books prove that the Plea in Bar is not good, for the Defendant destroys the Plaintiffs Action, but by way of Argument: And the rent by such Action is not demanded, but damages for tearing the Indenture, and so the Title of Rent is not in question, and exceptions were taken to the Declaration. First, the Action was brought for tearing the Counter-part, by which the Rent was not created: And the Indenture is not expressly granted to the Plaintiff, but the rent of 60 l. only is bargained and sold; and by that the counter-part that pertains to *Remingham*, doth not pass to the Plaintiff as an incident; for it is not the Originall Deed by which at first the rent was reserved, which was granted by all but the Cheife Justice, for he said that the counter-part waited upon the interest, and was good evidence for that: Secondly, the Plaintiff had not averred that *Ch.* for whose life the Rent was granted, was alive at the time of tearing the Indenture; and if *C.* was dead, the Indenture pertained to the Defendant of right, as Heir of *Ch.* for so much appeared by the Plaintiffs own shewing, which was granted. And thirdly, the Plaintiff shewed not that ever hee was possessed of the Deed but by way of Argument, to wit, that he casually lost it, which is not sufficient; for none shall have trespass but he who is in actuall possession, which was also granted by the Court. Fourthly, the counter-part whereof the Plaintiff complains, by the Plaintiffs own shewing, contained as well a warranty as the rent reserved: And therefore without a special gift made of that Deed by *Ch.* to the Plaintiff, that Deed doth not pass by Law to the Plaintiff, as it is adjudged in Lord *Buckhursts* Case. Fifthly, if *Ch.* the Father be dead, then the writing hath lost his force, as to the rent; for by his death the rent is determined, and therefore of necessity the Plaintiff ought to averre the life of *Ch.* For no Action lies for a Deed that is determined, and for these reasons the Plaintiff did discontinue his Action.

An Action of Trespass was brought for entring into a mans House, and continuing there divers dayes, &c. And after a Tryall and verdict for the Plaintiff, *Yelverton* moved in Arrest of Judgment, and shewed for cause that the Plaintiff had declared with a *continuando* for breaking his house, which he could not do; for the entring is one act done and ended at the going out again: And therefore if he re-enter, it is a new Trespass, and the *continuando* is only alledged for the aggravation of damages, 2 R. 3. 15. 10. E. 3. 10. 16. E. 3. 24. That a *continuando* cannot be for breaking the House: but *Doddridge* and *Haughton*

Nota.

*Haughton* Justices, the rest being silent, were of opinion that it might be alledged, that a *continuando*; for although it might be that if hee went forth, and re-entred, it should be a new Trespass: but if upon his first Entry he continued divers dayes, it might be alledged with a *continuando*: And see for that *Mich.* 38. *El.* in the Common Pleas, fol. 118. If a Disseisee re-enter he shall have an Action of Trespass against the Disseisor with a *continuando*: And so is *Fitzherberts N. brevium* 91. *L.* that a *continuando* may be laid as well for breaking a House as eating the Grass, and so is 10. *E.* 3. 10. and 20. *H.* 7. 30. by the opinion of *Gapley*.

A man cannot  
justifie the dig-  
ging of a mans  
ground in hunt-  
ing a Badger.

**G**ENSH against *Mynne*, *Pach.* 11. *Jacobi*. An Action of Trespass brought, wherefore by Force and Armes, the Close of the Plaintiff did break, &c. The Defendant justified, by reason there was a report that a Vermine called a *Badger* was found there to the great damage of the Inhabitants; by reason whereof he uncoupled his Beagles in the place where, &c. and hunted there, and found the *Badger*, and pursued him until he Earthed in the place where, &c. by reason whereof he digged the ground, and took the *Badger*, and killed him, and afterwards hee stopped up the Earth again, which is the same Trespass, and demands Judgment; whereupon the Plaintiff demurs: And upon reading the Record, *Scamber* of the Inner Temple was for the Demurrer, and that the Defendant could not justifie as this case was. And first, he was of opinion that the Common Law warrants hunting such noysome Beasts, although it be in the Lands of another, because it is good and profitable to the Common-wealth that such hurtfull Beasts should be extirpated, according to the 8. *E.* 4. 15. And Fishermen may justifie their Nets upon anothers Land, 13. *H.* 8. 16. 22. *H.* 6. 49. A man may justifie entring into a house to serve a *Subpana*, 3. *H.* 6. 336. A man may justifie the entring into anothers Land with the Sheriff to help him to distrain, but otherwise it is for things of pleasure, as 38. *E.* 3. 10. *B.* You cannot justifie the Entry when your Hawk hath killed a Pheasant in anothers Land: and so for hunting of Hares or Conies in the Free-hold of another: but although the Law allows and permits such Entries as aforesaid, yet the Law requires, that such things shall be done in an ordinary and usuall manner, as 12. *H.* 8. 2. A Commoner cannot digge the Land to make Trenches, although it be for the benefit of another; and this is confirmed and explained by the Statute of 8. *Eliz.* cap. 15. For although that Statute gives reward for the killing of Vermins; yet the Statute further saies, that it must be with consent, and with reasonable Engines and Devices, 2. *R.* 2. *Barr.* 237. Grant of Fish in the Pond; one cannot dig the Land and make a Sluce, but must take with them Nets: And so, if a man grant to me all his Trees in such a place, I cannot

I cannot grub up the roots out of the earth, if there be any other way to take them, but if there be no other way, then it is otherwise, as 9 *Ed. 4.* 35. *a.* A grant to put a Pipe in my Land, and afterward it is stopped, I may dig to mend it by the opinion of the Court, and therefore there being an Ordinary course, to wit, hunting, to kill the Badger, the digging for that is unlawfull, and the Action will well ly *Mich. 36.* and 37 *Eliz. 60.* *Nicholas Case* expressly for a Fox, and *Fenner* held it was not lawfull to break a Hedge in the pursuit.

**M**iles against *Jones, Pasch. 11 Jac.* Miles brought an Action of Trespass against *Jones*, wherefore by force and Arms his goods, &c. The Defendant pleads that the Plaintiff, 5 *Jacobi.* acknowledged a Recognisance of 100. *l.* at *Mich.* at which day he did not pay it, and that two years after the Recognisance was extended upon his goods, because the monies were not satisfied at the day, nor at any time after, the Plaintiff replies, that they were paid in the sixth year of *James*, and desires this, that it may be inquired onely by the Countrey, and the Defendant likewise, and upon the Triall, it was found for the Plaintiff, and it was new moved in arrest of Judgement, by *Goldsmith*, that there was no Issue joyned, for an Issue ought to be joyned upon a thing alledged by the party, for nothing is issuable, which is not traversable, but here the plaintiff alledges payment, a year after the day, on which the Defendant alledges a default in payment, and joyns issue upon his own saying, whereas he ought to have staid untill the Defendant had rejoyned to his saying, for the Defendant sayes not at any time after, and the Plaintiff replies that it was paid, which is other matter then the Defendant hath alledged, but by all the Justices it is an Issue, for Justice *Doddridge* said, that an averment is in any Case traversable, and issuable, for if an Executor plead that he hath no goods, nor ever had, whereas he should have pleaded, *Plene administr.* and so nothing in his hands: and *Man* the Secondary affirms it with other Cases, and as to the other matter, the plaintiff of necessity ought to have pleaded, that he had paid for one generally that he had satisfied, would not have been good, but must alledge some particular discharge, so that it may appear to be a discharge like to 22 *E. 4.* for although the Issue be not so good as it should be, yet the imperfection is helped by the Statute of 18 *Eliz.* of *Jeofails*, and the plaintiff had Judgement, and note, that although payment simply is not a plea in avoidance of the Recognisance, yet by all the Justices after Issue joyned and tryed, cannot take advantage of it, as *Nicholles Case*, in the 5. *Rep. 43.*

Nora.

**D**oyly against *White and Webb*, Trin. 11 Jacobi. Doyly brought an Action of Assault, Battery, and imprisonment, of his wife, against *White and Webb*. The Defendant pleads a speciall Justification, to wit, that in November, 2 Jacobi, an Action of Trespafs was brought in the Common pleas, by one *A.* against *Julian Goddard*, and upon the generall Issue it was found for *J. G.* and Judgement given for her, and afterwards, and before Execution, *J. G.* takes to Husband the now plaintiff, and afterwards brings a Writ of Error in the Kings Bench, and upon a *Scire Facias* against the said *Julian*, the Judgement in the Common pleas was reversed, and costs given to *A.* the plaintiff in the Writ of Error, and afterwards a *Capias ad satisfaciend.* was directed to the now Defendants to take the said *I. G.* by Force of which, the said Defendants took the woman of the now plaintiff, with an averment that the said *I. G.* and the Wife of the now Plaintiff, were one and the same person, and the plaintiff demurres upon this plea, and *Telverton* moved, that this justification was not good for divers causes; first, when the Sherif is to execute a process, he is to do it duly, and upon the right person at his perill, and for that see 11 H. 4. 90. b. If the Sherif take the goods of another in Execution, he is a trespassor, 5 E. 4. 50. a. If a *Capias* be to take *I. S.* and there be two of the same name, he ought to look to take the right man at his perill, and as he ought to take notice, so he must pursue his authority, and for this see 10 E. 4. 12. b. if a *Capias* issue out against *I. S.* the Son of *A.* and he take *I. S.* the Son of *B.* false imprisonment lies against him, and in a Case when his Warrant is against *I. G.* there is no such *J. G.* for by her marriage with the Plaintiff she had another name, and he is therefore a Trespassor for the taking of *J. Doyly*, and his averment cannot help him, because it agrees not with his Warrant, and so cannot be intended to be the same person, but if the variance was in the name of Baptisme onely, it would be otherwise, and secondly, although the party had admitted her to have the same name, yet the Sherff in pleading had taken expresse Conusance of the contrary, and had made it appear to the Court, that it was not according to his authority, and therefore he shall be punished, but the whole Court was of a contrary opinion, for first, the *Scire facias* was according to the Judgement in the Common Pleas, and well then might all the subsequent Prozesse be according in course of Law, but if the Husband had come upon the *Scire facias*, and shewed how that she was covert, then the Action ought to be against both of them; and secondly, the parties themselves in all the proceedings throughout, have all admitted that she is the same person, and that she had the same name, and therefore this differs from the 10 E. 4. 15. and therefore they shall be concluded from saying the contrary, and although the Sherff had shewed the marriage, that was but a bare allegation

Nota.



gation, and suggestion of the Sheriff, and it appears not judicially whether it were so or no; and thirdly, it would be dangerous for the Sheriff to return a *Non est inventus*, for because the parties have admitted her name to be so in all the proceedings, the Sheriff shall be estopped also, as the 3 *H. 7. 10.* and then an Action of the Case would ly upon the false Return, or if the Woman should be in the company of the Sheriff, and the party shew her to the Sheriff, she might escape.

**C***Arrill* against *Baker, Trin. 11 Jacobi.* The Plaintiff brough an Action wherefore by force and Arms, he entred into his Warren, and digged his Land, and chased his Conies, and took them, the Defendant pleads to all, except to the entring the Warren, chasing the Conies, and digging the Land, not guilty, and as to the entring of the Warren, chasing of the Conies, and digging the Land, he pleads an especiall Justification, to wit, that he had Common there time out of mind, and because the Plaintiff stored the Borrows there with Conies, and made new holes, by reason whereof the Defendants sheep feeding there, fell into them to their great damage, the Defendant did with a Ferret chase the Conies, and stopped up the holes with the earth digged out, &c. and upon that Plea, the Plaintiff demurred, and *George Crook* was of opinion that it was not a good justification, and the Question was single, whether a Commoner might drive out Conies which surcharged the Land, and he conceived he could not, for the Freehold and possession of the Land is in the Terr-Tenant onely, and the Commoners cannot intermeddle with it, for a Commoner hath onely the grasse of the Land, and not absolutely neither, to do with it what he pleases, but onely to take it with the mouths of his Cattel, and for this see 12 *H. 8. 2. a.* and 27 *H. 6. 10.* and 13 *H. 8. 16.* the espleas in a *Quod permittat* is alledged in taking the grasse with the mouths of his Beasts, and for that see 22 *Assis. 48. 10. E. 4. 4.* and 46 *Ed. 3. 23.* if a stranger put in his Cattell, the Commoner cannot have an Action of Trespass, and 13 *H. 8. 15.* ruled, that if a Commoner dig the Land to make a trench, he is a trespassor, but he may drive out or distrain for doing damage, and 15 *H. 7. 12. 13 H. 7. 13.* and 12 *H. 8. 2. a.* because after a manner he hath interest in the grasse, which is spoiled and consumed by the Cattell of the stranger, but although he may drive out and distrain the Cattell of an estranger, yet he cannot raedde with the Lords Cattel, or the Terr-Tenants, although there be more then reasonable, as in *Fitzherberts Na. brev. 125. D.* and 8 *E. 3. 30.* if the Lord surcharge the Common, The Commoner may have an Assise against the Lord, and if he be a copy-holder, he shall have an Action of the case, 9 *Rep. 112.* but the Lord may distrain *H. 9. 7. a.* Kings Bench, a prescription for a

Commoner to kill Conies of the Lords is not good, and he cited *Pasch. 43 Eliz. Kings Bench rotulo. 234. Belly and Laughorns Case*, the Lord may use the Sale as he pleases, but as his Case is the Commoner although Tenant of the Land, cannot kill the Conies with his Ferrer, For a free Warren in such a precinct, is a charge upon the Land, in what hands soever it comes, but if he hath a Warren adjoining, and the Conies come into the Lands of another, out of the Precinct, then he may kill the Conies, and he cited *Boslers and Hardies Case* in the Common Pleas, and for an expresse authority he cited *Old and Conies case, Hill. 29 Eliz.* and *Sir Robert Fitcham* he was against it, and he agreed he could not kill the Conies, but as to the digging he took this difference, if a Commoner makes any thing *de novo* in the Land, he is a Trespassor as it is adjudged in the Case of a trench before, and the like; but if a commoner amends and reforms a thing abused, it is no Trespass, and therefore, if the Land were full of Mole hills, he may dig them down, *13 H. 8. and 42 Assise* if the Lord make a Hedge the commoner may pluck it down, *23 E. 3. 6. a.* See if the Lord make a Pond in the Land, the commoners may dig and let the Water out, and therefore holes that were made long, in a hurt and Damage to the Land, the commoner may put the earth digged out, again into its place. Secondly, the Defendant hath shewed that the Cony holes were made by the Plaintiff himself, and he shall never take advantage of his own wrong: and Thirdly, the Law will allow every man to preserve his inheritance, and it cannot be preserved any other way, for if he should bring his Assise, yet he in that shall recover but *Seisin*, and no Reformation of the Trespass, and wrong done, and the opinion of the Court seemed to incline for the Plaintiff, and *Doddridge Justice* said, that a Lord or his Feoffee may make new conie-Borrows lawfully, for they are necessary for the preservation of the conies, but one fault found by Justice *Haughton*, in the pleading nothing was done, for the Plaintiff declared for entering into his Warren, the Defendant pleads to all, but the Warren digging, and chasing not guilty, and as to the digging and chasing, he justifies for common here, but answers nothing as to the Warren, neither by confession or traverse, and therefore all was discontinued, as *Herlackendons Case* is, *Co. 4. Rep.* and to this the whole court, *Fleming* being absent agreed.

**W** Aldron against *Moore, Trin. 11. 74.* The Plaintiff brought an Action of trespass against *Moore*, wherefore his Close called *Gerlesford* at *Rentesbury* in the County of *Devon*, by force and Arms hath broken and entred, &c. The Defendant pleads that a long time before the Trespass was supposed to be done, one *John W.* was seised of three hundred Acres of Land in *R. aforesayd*, of which the place in question

question called *G.* is parcell, and that 30 *H. 6.* the sayd *John Whithing*, reciting that whereas *N. de la moore*, 31 *E. 1.* the Plaintiffs Ancestor, Son and heire of *H. de la Moore*, grants to *William de la Moore*, *Corsum aque*, which runs from *W.* thorow the middle of the Land of the sayd *M.* And shews further, that by meane discents it discends to the Defendant, &c. and so justifies: The Plaintiff replies if *W. S.* was seised of the place where, &c. and made a Lease thereof to him for yeares; and traverses that the three hundred Acres of Land were parcell, and Issue joyned upon that, and found for the Plaintiff; and it was moved in Arrest of Judgement, that the Defendant had not made any answer to the Plaintiff, and so no Issue joyned; for the Plaintiff layes the Trespass in *G.* in *L.* the Defendant sayes he was seised of three hundred Acres, of which the place, &c. was parcell, but he conveys no title to himselfe, but by a course of water thorow the middle of the Land of *M.* but whose Land that was it doth not appeare, and is another thing; and therefore an Issue upon that which the Defendant doth not claime is voyd, and although Issue be joyned yet it is not helped by the Statute of *Jeofailes* of 18 *Eliz.* or 32 *H. 8.* for it is as no Issue when it is of a thing not in question, but if the Issue had been of a matter in question, although ill joyned, yet it is ayded as *Nichols Case* is, 5 *Rep.* 43. upon payment pleaded without Deed: And *Doddridge* and *Crooke*, Justices agreed to that, but *Haughton* seemed to incline that it was an Issue, and so helped by the Statute.

**F**uller against *Pettesworth* Knight, *Mich. 11. Jacobi.* Fuller brought an Action of Trespass against *Pettesworth* and his Servant, for breaking his Close, and taking one Cow in *D.* in the County of *R.* One of the Defendants plead not guilty, the Servant pleads that the Plaintiff holds of Sir *Peter P.* as of, &c. in the County aforesayd; and for services behinde, by the command of his Master, he seised the Cow, &c. The Plaintiff traverses, &c. and one *Venire facias* was awarded out of both the Villiages, and being found for the Plaintiff, it was new moved in Arrest of Judgement by *Finch* of *Grays Inne*, that two *Venire facias* ought to have been awarded, because the Issue is of things in severall places, for if there be severall Issues in one place, one Jury shall be onely Impannelled, but if in severall places for severall things locall, severall Juries shall be, but the whole Court held that one Jury onely should be impannelled, and one *Venu* onely should be awarded out of both the places; and it is all one as if it had been in one place, but it had been otherwise if in severall Counties, as 41 *Eliz.*

*One Venu out of two places in the same County.*

**D**AME *Petts* Case, *Mich. 11. Jacobi*. In an Action of Trespass brought by the Lady *Petts*, upon not guilty pleaded, the Jury being at Bar, the matters following came in question upon the evidence by *Haughton* and the other Justices: If *A.* be seised of a great Close, where, &c. and a Stranger enter and occupy part of the Close, yet notwithstanding *A.* continues the possession of the residue, whether this shall preserve his possession in the residue; and he shall be judged to be in possession of that, because it is an intire thing, 5 *E. 4. 2.* and 8 *E. 3. 13.* Seisin of part of the services is the seisin of the whole, and so is *Bettisworths* Case, 2. *Rep.* The possession of the House is the possession of the Land, for the Lessee against his Lessor of that which passes by one demise: But if a stranger enter and sever part by metes and bounds, nothing is wrought by the possession of the residue: Another question was this, A Lessee for yeares of ten Acres, paying twenty shillings Rent, the Lessee is outed of parcell, yet he payed all the Rent to him in Reversion; the Lessor having notice of the enter whether this protects the Reversion, so that nothing is gained by the entry but the interest of the Lessee, and shall be no disseisin: And *Yelverton* at the Barr was of opinion, that it should be no Disseisin, *Rijthen, Sess. 590.* saith, That so long as the particular Tenant continues his possession, so long is the reversion in the Lessor; for in such case as to the Lessor the Lessee shall be alwayes deemed in possession by force of the Lease; and the reason why the Lessee shall be adjudged in possession of all as to the Lessor, is, because the Lessor cannot have notice of the alteration of the possession; for when the Lessee by his owne Act or sufferance doth a thing in alteration of the possession, of which by common intendment the Lessor cannot have or take notice, there the Law will not prejudice the Lessor: And see for that, *Farmers* Case, in the third *Rep. 79.* If Tenant for life levy a Fine having Land in the same Villiage, this shall not bind the Lessor, if five yeares pass before he take notice of what Land the Fine is levied: And the same Law if Tenant for life make a Feofment to one who hath land within the same Village levies a Fine, and in this case if the Lessee hath continually payd all his Rent, the Lessor cannot intend or suspect, but that the Lessee is absolute Tenant of the whole: and in *Farmers* Case it is sayd, That if the Lessor levy a Fine, the Disseisee is barred without claime, for it is impossible but he to whom the wrong is done shall presently know it. But if he that hath the particular estate by Grant or trust reposed in him, shall secretly practice, although he pay the Rent and continue possession, yet it is otherwise: But the Reporters opinion was, that if in the principall case no Rent had been reserved, then the Reversion had been devested by the entry, for there had been no act done to mislead or hinder the knowledge thereof; and also although rent  
be

be reserved and all payd, yet if he had expresse notice thereof, the reversion had been devested, And secondly, if it should be a Disseisin a great mischeif would follow, for if a discent should be, it would take away the Lessors entry and yet no fault in them, because in common presumption the Lessee alwayes continued Tenant; but *Cook* of a contrary opinion, for he said, it could not be denyed but that the Lessee is out of the possession, and then it follows of necessity that the Lessor must be out of his reversion: And as to notice to make his claime, he must take notice at his perill, 4 *M. Dyer*, 143. b. But note, that this is when the Law intends that he may take notice, which it will not intend in this Case: *Haughton* was of opinion that it was a Disseisin, and *Doddridge* sayd, It would be mischeivous if it should.

*Hill. 6. Jac.* In the Common Pleas, that if in the Common Barre, in Trespass the place in the Common Barre is alledged to be *Blackacre*, the Plaintiff may plead that it is his Free-hold: and then it was held by the whole Court, that an *abuttall* of one side is sufficient without alledging it of every side.

**S***Waine* against *Becket*. An Action of Trespass brought for cutting down of Trees: And upon a speciall verdict the question was, that whereas there is a Mannor wherein are Copi-holders for life, which have used to lopp Trees growing upon the Copy-holds for their necessary fire, and repairing of their customary Tenements; the Lord of the Mannor maketh a Lease of the Mannor for yeares, excepting the Trees: the Lessee of the Mannor granteth a copy for life, the Copy-holder loppeth the Trees growing on his Copy-hold, whether by law he might do it or no was the doubt of the Jury. And it was held by all the Court that the Copy-holder might lopp the Trees, because he is in by the custome, which is above the Lords Estate after he is admitted, and that the copy-hold doth not depend upon the Lords interest: And that the Trees excepted, and the Soil remained parcell of the Mannor, because the Lease was but for years: but if the Lease had been for life, it had been otherwise, because it had been severed from the Mannor. And whereas it was objected, that the Tenant should not be in a better condition then his Author, it was answered that a Lord of a Mannor at will, may grant a copy for life, or in fee, and it is good. If the Lord cut down all the Trees, so that the Copy-holder can have no lopping, he may have his Action upon the Case against the Lord, as it was adjudged in *Gosnolds* case. If the Lord sell away his waste, and the Copy-holder dye, and the Lord grant a new copy, he shall have his Common. If the Lord sell away the Trees, so that the Copy-holder cannot have Estovers because the Bargainee felleth down the Trees, the Copy-holder shall have his Action against the

*Whether a Copyholder may lop the trees growing upon his Copy-hold, and held he might.*

*The Copy-holder is in by custome, which is above the Lords estate.*

*The Copy-holder shall have trespass upon the Case against the Lord for cutting down of trees.*



the Bargaine : Common and lopping are incident to the copy-hold, Judgment for the Defendant.

**H**Arris against Ap-John. An Action of Trespaffe brought ; the Defendant pleads not guilty , and verdict found for the Plaintiff. And in Arrest of Judgment it was alledged that the *venire facias* was *de placito debiti* : and so also was the *habeas corpus*, and it should have been *de placito transgressionis* : And it was amended by the whole Court.

**M**Yminnock against Bligh. Trin. 16. *Jacob. rotulo*, 1697. An action of Trespaffe brought for breaking the Plaintiffs Close, done *Septemb.* in the 13. year of King James : The Defendant pleads as to part of the Trespaffe in award , and that the Defendant submits himself to the award the 15. yeare : and that the Arbitrators in the 13. yeare , which was before the submission made the Award , and traverses that he was guilty of the Trespaffe after the award made : And the Plaintiff replies , that the Arbitrators the said day in the 13. year, made not any award , &c. And after Tryall exception was taken, that the issue was ill joyned, being of a thing that was void, yet notwithstanding Judgment was given for the Plaintiff, and they resembled to a payment upon a single Bond , and conditions performed at a Feast, not contained in an Obligation.

*Trin.* 15. *Jac. rotulo*, 3044. An Action of Trespafs brought, wherefore by force and armes his Goods and Chattels , to wit , a thousand posts, and forty railes took and caryed away, and damages given in-tire, and after a verdict exception taken, because *Rales* was pretended to be no Latine word, nor to have any exception , but Judgment was given for the Plaintiff.

**D**Uncomb against Randall, *Hil.* 9. *Jac. rotulo*, 2267. Three issues in Trespaffe : One issue was upon a prescription, to wit , that they had accustomed to have for himselfe his Farme and Tenants of the same Mannor, common of pasture in the said , &c. for all his Sheep which are *levant* and *couchant* in and upon the Demefne Lands of *W.* which lye, and are in *A.* aforesaid every yeare : And exception was taken for the uncertainty, because it did not appear that those were demefne Lands which lye in *A.* for it was ill pleaded, and ought to be averred ; but notwithstanding it was held good after a tryal, and Judgment was given for the Plaintiff , and in this case an exception was taken to the *venire facias*, because it was of *A.* and of the Mannor of *C.* and because it was made in this manner, to wit , *de visu de A.* and *de visu manerij de C.* but it was disallowed , because against the form used in the Common Pleas.

**D**ownes against *Skrymsber*, *Trin. 9. Jac. rotulo*, 334. An Action of Assault and Battery brought, and there was a Demurrer upon the Evidence: And the case was, that the Defendant the day specified in the Declaration said, that the Plaintiff assaulted the Defendant, and in defence of himselfe justifies the beating; the Plaintiff replies that he did it of his own wrong, without any such cause: and in the Evidence the Defendant maintained that the Plaintiff beate him the day mentioned in the Declaration, and in the same place. And the Plaintiff perceiving that, gave in evidence that the Battery was made another day and place, to wit, &c. which was the cause of the speciall verdict; for if there be two Batteries made between the Plaintiff and Defendant at divers times, the Plaintiff is bound to prove the Battery made the same day in his Declaration, and shall not be admitted to give another day in evidence, by the opinion of the whole Court.

**H**eydon against *Mich. 8. Jac. rotulo*, 839. An Action of Battery brought against three, two of them pleaded not guilty, and Judgment by *non sum informat.* against the third, and the two were found guilty for all: And the Jury gave damages severally, against one a 100 l. and against the other a 100 s. and what Judgement should be given was the question: and at first the Court was of opinion that the Plaintiff should not have Judgment at all; for where the Defendants are found guilty of all the Trespass, in this case, the damages shall be intire; but if one shall be found guilty of part, or at another time in this case, the damages shall be severall, otherwise not. And they thought a *Venire de novo* ought to issue out, because the Jury had mis-behaved themselves in severing the damages; but afterwards, it was resolved that the damages that were given by the first Jury, to wit, one 100 l. should be recovered against all the Defendants in that Writ named: and that in Trespass the first Jury taxes the damages for the whole Trespass, and that shall bind all the Defendants, and therefore execution was given against all the Defendants for the hundred pounds, *Trin. 9. Jam. rotulo*. 1835.

Nota.

**B**anks against *Barker*, *Hill. 12. Jac. rotulo*, 1979. In an Action of Trespass, the *venire facias* was well awarded upon the case of the *venn* in *Westown*, and of the Mannor of *D.* and the Writ of *Venire* was mistaken, to wit, of the *venn* of *Westown*: and exception being taken after tryall, the Court was moved for the amending of the *venire facias* by the roll; and it was denied, because the Jury did come of another *venn* then they ought by the Law of the Land to come, and therefore could not be amended: but afterwards the

Nota.

Court seemed to be of an opinion, that the awarding of the *venn* in the roll was mistaken, because it was of the *venn* of the Villiage and Mannor: and it should have been of the Mannor only, being to try a custome of the Mannor.

Nota.

**F**orrest against *Headle, Hill. 13. Jac. rot. 1123.* An Action of Trespass brought, and a *continuando* of the Trespass unto the day of the shewing forth the Plaintiffs Originall, to wit, the 20. day of *November*, which day was after the shewing forth of the Originall: and because the Jury gave damages for the whole time, which ought not to be, it was proved that the Judgment upon the verdict might stay, but by the whole Court the *videlicet* was held idle, and Judgment given for the Plaintiff.

Nota.

**C**ocks against *Barnsley, Hill. 10. Jac. rotulo, 2541.* An Action of Trespass brought, and a speciall verdict found, and the question was, whether Land held in ancient Demesne was extendable for debt, and an action of Trespass brought for that cause. And Justice *Nichols* held it was extendable; for otherwise, if it should not be extendable, there would be a fayler of Justice; for if a Judgment should be had against a man, that had no other Land but what was in ancient Demesne, and that it could not be extendable, there would be a fayler of Justice, which the Law doth not allow of: but an Assize, or a re-disseisin doth not lye of Land in ancient Demesne, because of the Seisin that must be given by the Common Law, and it would be prejudicial to the Lord, which the Law allows not: and *Wynch* and *Hubbard* were of the same opinion. For ancient demesne is a good plea, where the Free-hold is to be recovered, or brought in question, but in an action of Trespass it is no plea. And note, that by this execution, neither the Free-hold nor Possession is removed, but only the Sheriffe enters to make execution upon a Judgment had in the Common bench in debt, which is a proper Action to be brought there.

Nota.

**W**Right and his Wife against *Mouncton, Hill. 12. Jac. rotulo, 43.* An Action of Trespass brought, to which the Defend. pleaded not guilty: And the Husband only made a challenge, that he was servant to one of the Sheriffs, and prayes a processe to the Coroners; and the Defendant denies the challenge: and therefore notwithstanding the challenge, the *Venire* issued to the Sheriffs; and after a tryall, exception was taken, because the woman did not joyne in the challenge: and it was held that the Husband and Wife should joyn in the challenge, although the cause of challenge proceeded from the Husband only; but after tryall, it was helped by the Statute of *leofailes*, and Judgment given for the Plaintiff.

Bide

**B***Id*e against *Snelling*, *Hill*. 16. *Iac. rotulo*, 1819. An Action of Ejectment brought, and also a Battery in one, and the Writ: and after a verdict it was moved in Arrest of Judgment, because the Battery was joyned with the Ejectment. The damages were found severally, and the Plaintiff had released the damages for the Battery, and prayed Judgment for the Ejectment: *Winch* held the Writ naught, but Judgment was given for the Plaintiff notwithstanding.

**S***teward* and his Wife against *Sulbury*. An Action of Trespass brought, wherefore by Force and Armes the Close of the Wife while she was sole at *D.* hath broken: and the wood of the said *D.* to the value of 100 s. there lately growing, hath cut down and carried away, and in his Count shews that he hath cut downe two acres of wood: and exception was taken because he declared of so many acres of wood, and not of so many loads of wood, to wit, twenty, &c. loads, and held by the Court to be a good exception.

Nota.

**B***lackesford* against *Althin*, *Trin.* 14. *Iac. rotulo*, 3376. An action of Trespass brought, wherefore by Force and Armes a certain Horse of the said Plaintiffs took away, &c. The Defendant conveys to himselfe a certain annuity, granted to him by one *John Hott*. The Plaintiff shews, that one *William Hott*, Father of the said *John Hott*, the Grantor was seised of Land in Fee, which Land was Gavel-kind Land, and devised it to his Wife for life, the remainder to *John Hott* the Elder, and *John Hott* the Younger his Sonne, and the Heirs of their bodies: And afterwards *William* dyed, and the Woman entred, and was seised for life; and the two sonnes entred, and were seised in tayl, and being so seised, *John Hott* the younger had issue, *John Hott*, &c. and traverses without this, that *John Hott* the Father, at the time of granting the annuity was seised of the Tenements aforesaid, with the appurtenances in his Demesne, as of fee, as, &c. And the Defendant as before, saith, that the said J. H. the Father at the time of the granting the annuity aforesaid was seised, and after the tryall it was moved in Arrest of Judgment, supposing it was mistried; because the issue was, that the said J. H. the Father, at the time of the grant, &c. And it doth not appear that the said J. H. was nominated Father, neither could it appear that the said J. H. was the Father, and so the word Father was idle, and the Court were of opinion, that it was helped by the Statute of *Jeofailes*: and the word Father was idle, and judgment was given for the Plaintiff.

**A.** brought an Action of Battery against the Husband and Wife, and two others; the Wife and one of the others without the Husband pleads not guilty, and the Husband and the other pleaded, *sen*

H h 2

*assault*

*assault demesne*, and tryed and alledged in arrest of Judgment, because the Woman pleaded without her Husband : and Judgment was stayed, and a Repleader alledged, and this case was confirmed by a case which was between *Tonges* and *Bartram*.

**H***Arvy* against *Blacklole*, *Trin. 8. Jacobi. rotulo*, 1749. An Action of Trespafs brought, wherefore by force and Armes his Mare so strictly to a Gelding did fetter, that by that fettring the Mare afore-said did dye. If a stranger take a Horse that cometh and strayeth into a Mannor, the Lord may have his action of Trespafs. If my stray doth stray out of my Mannor, and goeth into another Mannor the day before the yeare be ended, I cannot enter into the other Mannor to fetch out the stray : If I take an Horse as a stray, and another taketh him from me, the Action lyeth not by the Owner against the second taker, because the first taker hath devested the property out of the Owner. The Defendant in this justified the taking of the Mare as a stray, and did not alledg that he came as an estray, and the Plea was held insufficient, and the Court held they could not tye them together : And the Defendant said, that the Hayward took the Mare and delivered her to the Defendant ; this was but not guilty, and Judgment for the Plaintiff.

**L***Uttrell* against *Wood* and other Defendants, *Pasch. 40. Eliz.* An Action of Trespasse brought, wherefore by Force and Armes he broke the Plaintiffs Close, and cut down his Trees. The Defendant in Barre to the new assignmen<sup>t</sup>, alledges that he is a Copy-holder for life of the Mannor of *Mynehead* in the County of *Somerset* : and that in that Mannor there was a Custome that every Copy-holder for life had used at his pleasure, to cut downe all the Elmes growing upon his customary Lands, and to convert them to his own use, when, and as often as hee would, and so justifies, and a Demurrer upon the Barre : And the question was, whether the Custome was good and reasonable ; and the later opinion was, that it was a good and reasonable Custome, but now it is otherwise held.



Actions of Waste.

**I**N Waste the Writ shall be brought where the Waste was committed : And the Processe in this Action is *Summons*, *Attachment*, and *Distresse*, peremptory by the Statute of *Westminst. 2.* But at the Common Law the Distresse was infinite. And if the Defendant doth not appear upon the Distresse, although a *Nihil* be returned, yet the Plaintiff shall have Judgment, and a Writ to inquire of damages of the Waste, and an *Essoine* lies, as in a *Quare Impedit*, and the Processe shall be executed as in a *Quare Impedit*, and returned from 15 dayes to 15 dayes, and the Plaintiff in this Action shall not recover costs, but the value of the Waste found by the Jury shall be trebled by the Court ; for costs shall not be recovered in such Actions as are given by the Statute, as in this Action a *Decies tantum*, and *Quare impedit* : And so Judgment is to recover the place wasted, and severance lies in this Action, *Mich. 9. H. 4. rot. 104.*

And note, in the tryal of the issue in Waste, if the Defendant by his Plea doth not confess the Waste, six of the Jury which are impannelled to try the Waste must have the view of the place wasted, to the intent that the Plaintiff may be put in possession of the place wasted by the view of the Jury : And if the Defendant confesse the Waste, the Jury ought only to inquire of the value of the Waste, but not who committed the Waste : But upon a default upon the grand Distress, the Sheriff in his proper person shall repair to the place wasted, and there inquire what waste and spoile is done. And if he doth not return that he was there in his proper person, it is naught : But upon a Judgment by *non sum informat. nil dicit*, or in a Plea by which the Defendant confesses the waste, the Sheriff shall inquire only of the damages : And he is not bound to return upon that Writ, that he in proper person went to the place wasted : And when the Judgment is by default, the challenge lies against the Sheriff, and if it be denyed it is Error : And if the Plaintiff do not take judgment upon the first distress, being returned, executed, but takes another distress, it is Error.

And no receipt lies by the Wife upon the default upon the Distress at the return of the Writ to inquire of the waste, *Trin. 6. H. 6. rotulo, 133.* For if the Woman at the Assize before verdict, doth not pray to be received, she shall never be received afterwards in the Court, at the return of the *Nisi prim.* And note, that the Jury may give

give severall values, and one joynt value of the place wasted, but severall values is the better way.

If a Lessee for yeares makes a Lease of one moiety to one man, and of the other moiety to another man, and one of them commit Waste, the Action shall be brought against the two, for the Waste of one is the Waste of the other, if a Lease be made by three to one for life, and afterwards two release to the third, and the Lessee commits waste, he alone shall have a Writ of Waste, supposing that hee demised onely.

If Waste be committed in two Villiages, and the Sheriff hath executed his Office naughtily in one Villiage and well in another, all shall be inquired of, *De novo*, because the whole in Inquisition was but one Inquest at one time; but if the Plaintiff assigne the Waste in the Houses and Woods, and it doth not appeare by the Count, that the Houses were demised; and upon a *Nihil dicit*, a Writ to inquire of the damages issues out, and the Jury find, &c. the Plaintiff shall have his of the Houses.

**B**edell against Bedell, *Trin. 8. Jacobi, rotulo 3052*. An Action of Waste brought; the Case was, There is a devise to two for one and twenty yeares, the Father and Son, and made the Son Executor, and he refuses to prove the Will, and take the terme, and so no Waste committed. And if Lessee for life and his Lessor joyne in a Lease for yeares by Indenture, and the Lessee for life dye, and waste is committed, the surviving Lessor shall have the Action of Waste, and shall count that he did demise it alone: If a Lease be made to Husband and Wife for life, and for twenty yeares after their deaths, and the Wife dye, and Waste is committed, the Wife shall not be named in the Writ, nor the terme after her death.

If Husband and Wife during the Coverture make a Lease, and Waste is committed, they both shall joyne in the Action of Waste: And if a Lease be made but for one yeare or for halfe a yeare onely, yet the Writ shall be for a terme of years, but the Count shall be speciall; if a Lessee for yeares or life grants Rent out of the Land he had for yeares, and afterwards commits Waste, if the Lessor recover the place wasted, the Land shall be charged: If a Lessee for a hundred yeares grants part of his terme to another, and he commits Waste, the Action shall be brought against the first Lessee. If Tenant for life commits waste, and afterwards grants his estate to another, waste shall be brought against him in the *Tenet*; and after Judgement, a *Scire facias* shall issue to the Grantee, to shew cause wherefore the Plaintiff shall not have Execution of the place wasted; and the like if Lessee for yeares commit waste, and grants over his Estate, Waste shall be brought against him in the *Tenet*.

And

And if a Lease be made for life, upon condition that if the Lessee shall do such an Act, his Estate shall cease; and he doth commit such an Act, the Writ shall be brought against the Lessee in the *Tenet*, although his Estate be ended: And the like if a Lease be granted to a Woman so long as shee shall live sole, or shall behave her selfe wel, if shee commit Waste, the Writ shall be brought in the *Tenet ad terminum vite*, and the Count shall be speciall: If Tenant in Dower grants over his Estate to a Stranger and commits Waste, yet the Action lyes against the Tenant in Dower, but otherwise it is if the Heire grants over his Estate: And the like for Tenant by the Curtesie.

If Waste be brought against two, and one appear upon the *Disfringas*, and the other make default, the Plaintiff shall have a Writ to inquire of the Waste, but shall declare against him that appears, for a man shall not recover by moities in Waste, as one shall recover in a *Precipe quod reddat* against two, for in waste the Land shall not be lost by default, by an Action tryed, and if a waste be committed between the Judgement and Execution, a writ shall be awarded to inquire of the waste, but *Quare* thereof: If a woman while she is sole commits waste, and marries, the writ shall be, that the woman while she was sole committed waste, and if Tenant in Tail in remainder brings an Action of waste against Tenant for life, the writ may be, which he holds of the Tenant in Tail, although they hold of him in the Reversion in Fee, and so it was adjudged, *Pasch.* first *James*, that the writ was good. An Action of waste lies against Executors for waste, for waste committed by the Testator, and if a man have Land in the Right of his Wife, and waste is committed, and the woman dies, now no Action of waste lies against the Husband, after the death of the wife.

In waste, if the Term be ended, and nothing be recovered but damages, there a concord with satisfaction is a good plea, and if the Lease for years determines, pending the writ, the Plaintiff shall recover nothing but damages, and not the place wasted. The Defendant may disclaim in his Action, if he that hath the fee, pleads no waste done, this is a forfeiture of his Estate; the Defendant may plead no waste done, and give in Evidence that the Tenements at the time of the Demise were ruinous, ancient Demesne is no Plea in Waste.

If a Guardian in Socage, in the Right of his wife commits waste, the writ shall be brought against the Husband onely, *Mich.* 27. *Ed.* 1. *rotulo* 329.

If an Action of waste be brought against the Husband and wife, and the Husband appear upon the *Disfringas*, and the wife maketh default, this shall be the default of both of them, *Mich.* 20. *H. 4. rotulo* 393. the Plaintiff may abridge the waste assigned in part, so that he a-  
bridges.

<sup>a</sup>bridges not the whole, as if writ be of waste in houses and wood, he may abridge part of the assignment in the houses and woods, but not the whole, and if Issue be joyned for part, and demurrer for another part, the Issue may be tryed before the Demurrer adjudged.

If an Indenture to raise uses upon good consideration be made, and he that hath the Estate for life commits waste, he to whom the reversion is limited, by the same Indenture may have a generall writ of waste, by saying generally, that he hath demised, it or a speciall writ at his pleasure, and *Mich. 27 H. 7.* it was held by all the Judges, that it is an ill return, for the Sheriff to return upon a writ to inquire that he hath commanded his Bailiff, because the Sheriff is both Officer and Judge, which power cannot be committed to the Bailif of the Liberty, and the writ is a *Non omittas* in it self, but *Quare*, for there are divers Presidents against it, the Lessee may cut down Trees for the repairing of houses, when the Lessor is bound by covenant to repair, and doth not; and it is no good Plea, for the Lessee in waste brought against him by his Lessor, to say generally that he hath nothing in the Reversion, but he must shew how the Reversion is not of him, but upon a grant of the Reversion, and waste be brought by the Grantee, nothing in Reversion is a good Plea. Upon no waste pleaded the Defeudant cannot give in Evidence that the Tenements were sufficiently repaired before the writ brought. If an Issue arises in a foreign County, the Jury shall not be examined of the view, and if the Jurors be not examined of the View when they should be examined, it is Error.

If my Father leases Land for term of life, the writ of Waste shall be of houses, &c. which the said *A.* Father to him demised, and so in a Writ of waste, of a Lease made by my Predecessor, but if the Abort, or the Son himself bring the writ, it shall be of Houses, which he holds for a Term, &c. if waste be made (*sparsum*) in a Close or wood, the Plaintiff shall recover the whole Close or wood, and the treble value shall be levied by *Fieri facias*, or *Elegit*, and not by *Capias*, because a *Capias* lies not upon the Original, the Sheriff may take a *Posse Comitatus* to stay the Tenant from doing of waste upon an estreptment. Two Tenants in Common, one of them makes a Lease for years to the other.

An Action was brought against Tenant for years, by him in the Reversion: the Case was, that the Lessorafter the Lease made, granted another Lease in Reversion for yeares, and this matter pleaded in abatement, pretending that the Lease in Reversion, was an impediment against the Plaintiff, inbringing his Action, but otherwise adjudged, for if a Lease be made for life, the Remainder for years, and waste be committed by Tenant for life, notwithstanding the Lease for years in remainder, waste lies.

**S**Keate against Oxenbridge and his wife, *Trin. 12 Jac. rotulo 849.*  
Waste brought of Lands and Gardens, in *L.* of which *E.K.* was  
seised in his Demesne, as of Fee, and being so thereof seised, after  
the fourth of *February*, 27 *H. 8.* thereof infeoffed *E.S.* and o-  
thers to the use of the said *E.S.* dead, and of the said *E.* for Term  
of their lives, and the longest liver of them, and after the decease  
of the said *E.S.* and the said *E.* then to the use of the Heirs of  
the body of the said *E.S.* to be begotten upon the body of the said  
*E.* of which said *E.S.* dead, the now Plaintiff is Son and Heir  
begotten on the body of *E.* committed waste, and in the Declaration  
he shewed the Feoffment made to the Feoffees, and the *habend.* to  
them and their Heirs, and because the word Heirs was omitted in the  
writ, exception was taken, but because it was in the Declaration, it  
was adjudged good; and note, in this Case the woman was received up-  
on the default of the Husband, and pleaded to Issue. If the Feof-  
fees have but an Estate for life then they cannot convey an Estate in  
Fee simple over.

**S**aunders against Marwood *H. 41. El. rot. 747.* An Action of waste  
brought in the *Tennit* against the assignee of the Term, by the assign-  
nee of the Reversion for wast committed in digging of Sea Coals: the  
Defendant pleads in Barr, that the first Lessee, opened the ground,  
and granted to him all his Interest in the Land, with all profits, except  
and alwayes reserved to him his Heirs and Assigns, all the Title of the  
Coal-Mines in the said parcell of Land, and all Timber Trees, and  
averres that the Mine in the Land, at the time of the Grant made,  
was, and yet is open, and adjudged no Barr, for he had no power to  
intermeddle with the digging for coals, and to except with which he  
had no power to meddle, is void exception, and the Defendant was  
punishable for the waste by the whole Court.

*waste in the  
Tennit for  
digging of Sea  
coals.*

**L**asbroke against Saunders, *Pasch. 41. El. rotulo 1532. or 2592.*  
In waste, the Case was in the Lease, there was this *Proviso*, to wit,  
provided that the Lessee shall not fell the wood, the Defendant pleads  
the *Proviso*, and saith, he hath not demised it, and the Question  
was, whether these words, provided and agreed, are an exception, or no,  
and adjudged that the word provided is no exception, and the wood  
was demised.

*Exemption void*

*Provided not exception*

*The End of the Book.*





[illegible]

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The

*The times when these severall Officers of the  
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<i>Custodes Brev.</i>	<i>Thomas Spencer, Ar. Henery Compton, Miles balnei. Jo. Glyn, serviens ad Legem.</i>	<i>Pasch. 33. Eliz. Circa An. 5. Car. 5. Febr. 19. Car.</i>
<i>Capital. Prothon.</i>	<i>Johannes Foorde. Gulielmus Nelson. Richardus Brownelaw. Thomas Cory.</i>	<i>27. Jan. 27. Eliz. 15. Novem. 25. Eliz. 9. Oct. 32. Eliz. 9. Oct. 14. Car.</i>
<i>Sedi' Prothon.</i>	<i>Zacharias Scot. Thomas Crompton. Johannes Goldesborough. Johannes Gulston. Richardus Barnard. Johannes Pynsent.</i>	<i>9. Oct. 27. Eliz. 10. May 7. Jac. 7. May 11. Jac. 15. Oct. 16. Jac. 9. Febr. 19. Car. Ult. May 20. Car.</i>
<i>Try' Prothon.</i>	<i>Laurentius Rardford. Hugo Browker. Thomas Waller. Robertus Moyle. Geo. Farmer.</i>	<i>30. Oct. 23. Elizabeth. 28. November. 31. Eliz. 23. Jan. 5. Jac. 7. May 3. Car. 16. Oct. 14. Car.</i>
<i>Cliv' Warr.</i>	<i>Gulielmus Anderson. Geo. Reading. Milo Hobert. Gulielmus Rolfe.</i>	<i>12. 1. May 1. Jac. 10. Oct. 6. Jac. 25. Dec. 13. Jac. 11. May 1. Car.</i>
<i>Cliv'. argenti Regi.</i>	<i>Jo. Gulston. Henery Ewer.</i>	<i>23. Jan. 10. Jac. 2. Oct. 16. Jac.</i>
<i>Cliv'. Error.</i>	<i>Antonius Wright.</i>	<i>6. Dec. 18. Jac.</i>

FINIS.





# REPORTS:

( A Second Part. )

O F

Diverse Famous CASES in LAW, as they were Argued, as well upon the Bench, by the Reverend and Learned JUDGES, *Coke, Flemming, Hobard, Haughton, Warburton, Winch, Nicholls, Foster, Walmesley, Telverton, Montague, Dodridge*, and diverse others, in their respective Places; as also at the Barr, by the then Judicious Serjeants and Barristers of speciall Note.

---

*Collected by* RICHARD BROWNLOW Esq;  
*Prothonotary of the Court of COMMON PLEAS.*

---

Very beneficiall for all such who are Studious to know LAW, in its Power, Act, and Limitation: *Directivè*, and Usefull for all Clerks, Attorneys, &c. In their *Inter-Agendum's*, or severall Ministeriall Functions.

WITH A PERFECT TABLE SHEWING THE  
*Remarkable matters Argued and Concluded in this Book.*

---

Protag. de Leg. lib. 5.

Θεὸς δέσας τοῦ τῷ γενεῖ ἀνθρώπων μὴ ὑπολοιτο πᾶι; Λαοκραται  
Αἰδῶς τὴν καὶ Δίκην : αἶνα εἴ εἰν πόλεων κόσμοιτὲ καὶ δισμοὶ καὶ  
φιλίας συνάγων

---

L O N D O N,

Printed by *Tho: Roycroft*, for *Matthew Walbancke*, at *Grays-Inne Gate*, and *Henry Twyford*, in *Vine Court*  
Middle Temple, 1652.





TO  
THE READER.



**U**PON the strict survey of Natures Products, there is nothing to be found, whether in the bosome of its Causes, or in its Singularities, within the Convexity of the Universe, which being contemplated at an intellectuall distance, beyond the Magnetick Effluvium of our Senses, doth not felicitate with more certainty, Nedom, probability, as more obsequious to the Prototype of its projection, then **MAN**: the very Cronologie of whose Errors doth compute his Existency, an ingratesfull returne for the dignity of his Essence, which unmolested and freed from the Procacity of his Junior and Inferior faculties, would have fixt him in the harmonious Orbe of his motion, and have secured him, as well against the scandall of a Planetique, as the Ecclipse of his native glory: But alas! the doome is past, Ex Athaniis in Barathrum, hee's now benighted with Ignorance, Phainomena's, and Verities; an Ignis fatuus, and a Linck-boy, are Eodem calculo; which condition imposes upon him something more then Metaphorically, the semblance of a Moth-flye, which is in nothing so solicitous, as in its owne ruine: Neverthelesse had Privation in his Judgement been the onely losse, hee could then have undergone; but his Poco di matto, but his will, and too teo cereous Potestatives, have Stigmatiz'd him in all his habitudes, undiqueversum, with a more reproachfull Sobriquet of Vellacazo teso, in which shamefull state, forgetting his Constitutive Nature, and rudely breaking through his Divisive difference, he seems now to be lost, if perchance he is not found in the confused

## To the Reader.

Cic. lib. 1. de  
Invent. Rhet.

*Thickets and Forests of his Genus; where measuring his actions (rather Aufa furosa) by the Cubit of his strength, he giddydes himselfe into a Maze of Inquietudes, shuffling the Malefactor and Judge into one Chaire, to make up the Riddle of all Injustice, because all things are just; Hence was the no lesse opportune, then needfull Venu of Cicero's Vir magnus quidem & sapiens, &c. Hence the blissefull emergency of all Laws, the limiting Repagula's of his Insolency, and the Just Monuments of his Depravity: But Hinc polydacrya, he is yet so unwilling to forgoe his bainefull Appetite (Reasons too potent Competitor) that he is still perswaded he may safely act without controlment; though like a Partridge in a Net, he finds no other Guerdon for his Bustle, then a more hopelesse Iterition: And as if he were damned to be a Jury to himselfe, he will not admit that wholesome and thriving Councell, That Obedience to Laws is a much more thriving peice of Prudence then Sacrifice; and as much differenced as innocency, and guilt ignorant of its expiation. Whence I conceive by a just title, to keep the World from Combats, and the reward of vertue from Violation, the wisest in all Ages have had the priviledge, not onely of prescribing, but of coacting the orders of Regiment amongst others, who by necessary Complot have engaged for observance; which something seems to repaire the loss; yet so, as by our Dianoeticks, we have opportunity enough to see, and like the Satyre in the Fable, to feare, our Idæated Humanity, although in a more sublime contemplation, it may fall out otherwise, in respect that the Law of Essences are more certaine, and of a far more facile direction, then those of existency; which is so necessarily entituled to infinite Incertainty, from Approximation of Accidents, that it would now be an equall madnesse for the Governour to think he can, or the governed to fancie hee should, constitute Laws, Adæquate to humane Velleity, since the wills of no two Sons of Adam did ever Mathematically concenter, nor were ever two humane Actions shaped with parallel circumstances; which, as it seems necessarily to import the deficiency of the Rule, so also to imply the evident reason of Debating and Reporting of Cases in our Law: And the denoting of Limitations in that of the Empire; which first, properly are, or (a notatione) at least should be, no other then Exceptions to the Rules generall, from a  
due*

## To the Reader.

*due consideration of individuating circumstances. For the Expediment of which knowledge, this Gentleman, the painfull Collector of these ensuing Relations, for his owne benefit, whilst yet living, and for the good of others, who by natures Decree should see his Pyre, did think it Tanti to make his Observations Legible: There now remaines nothing, but thy Boni consule, in which thou wilt oblige the Publisher to continue thy Freind in all like Opportunities.*

R. M. Barr :



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THE  
SECOND PART OF  
BROWNLOWES  
REPORTS  
Containing divers excellent Cases and  
Resolutions in Law.

*Lynche against Porter.*



THE Plaintiffe in Prohibition suggests that hee inhabited in *London*, within the Diocesse of the Bishop of *London*, and was cyted to appeare in the Court of the Arches, and was out of the Diocesse of *London*, without license of the Bishop of *London*, against the Statute of 23. *Henry* 8. And upon the first motion, the Court gave rule to the Defendant to shew cause why the *Prohibition* should

*Prohibition upon the statute of 23. H. 8. Chap. 9.*

not be granted; and to heare the Civilians, and to conferre with them concerning the practise and expounding of the Statute of 23. *H. 8. Chap. 9.* And at the day appointed, three severall Civilians came into the Court, and were heard according to the former Order: and they say, that they use to cyte any Inhabitant that inhabits in *London* to appeare, and to make answer in the Arches originally; for the mischief that the Statute of 23. *H. 8.* intends to prevent, was, that those which inhabite in Dioces remote from *London*, should not be sued here without licence from the Ordinary; but this mischiefe was not in this case. And Doctor *Martin* saith, that so it was used by the space of 427. years before the making of the Statute, and then was complaint made thereof to the Pope, and he was answered, that it was the use that any man might be cyted to the Arches out of any Diocesse in *England*: and also that the Arch-Bishop may hold his

B

Confi-

Consistory in any Diocese within his Jurisdiction and Province : And also that the Arch-Bishop hath concurrent Jurisdiction in the Diocess of every Bishop as well as the Arch-Deacon. And then, if the suit be first begun in the Court of the Arch-Bishop, or the Bishop, or Arch-Deacon, it ought to be there determined where it had its beginning, and shall not be inhibited : And then it was objected by *Cooke*, cheif Justice, that the Statute of 23. H. 8. was affirmed by Canon 94. And this sheweth the agreement of the Civilians with the said Statute. And to this Doctor *Martin* answered, that the said Canon was made in the vacancy of the Church of *Canterbury*, for the Sea of the Arch-Bishoprick was then void : and also he said, that the Arch-Bishop of *Canterbury* prescribes to hold plea of all things, and of all persons in *England* : And the Pope hath no power to make Canons against the Law, nor against any Custome or Prescription ; and for this it shall be void, and that shall not bind the Arch-Bishop which is against the said prescription ; and also it seems to the Civilians, that the exposition of the said Statute being the Ecclesiasticall Statute appointed to them : And also it was said by them, that this detracts from the Arch-Bishops Jurisdiction against the custome of the Realm, and every Subject hath interest in that : And also that the Bishop takes notice,] that they hold plea of the said cause, and took no exception, and that made a sufficient assent, and amounted to a license in Law, and so concluded that a prohibition ought not to be granted in this Case. *Coke*, cheife Justice saith, that the Mischeife which the Statute of 23. H. 8. was not only to prevent the mischeife that those which inhabited in places remote from *London*, should not be cyted to come to the Court of the Arch-Bishop, but also to give to them other priviledges, which by the Law they ought to have, that is, the Appeale that they loose by the beginning of the Suit in the Arch-bisshes ; for they may appeal from the Ordinary after the suit begun here to the Arch-Bishop ; which benefit is lost if the suit be begun before the Arch-Bishop originally : and for that the Inhabitants in *London* are as well within the Mischeife as the body of the Act of 23. H. 8. And also that at the making of the said Canon, the Arch-Bishop of *Canterbury* which late was, had the Jurisdiction of the same then committed unto him, he then being Bishop of *London* : So that upon the matter he was Arch-Bishop of *Canterbury*, so that the unity of the Sea of *Canterbury* shall not be avoidance of the said Canon ; and he agreed that a Canon against Statute Law, or Common Law, or any Custome, shall not bind the Subject ; and agreed, that so it had been adjudged in this Court. But he denied that the exposition of any Statute belonged to the Ecclesiasticall Court ; for the Statute is meer temporall, though it concern spirituall things, and it shall be expounded according to the Rules of the common Law, see 5.

*Edw.*



*Edw. 4. Keafors Case:* And so concludes that this suit was against the Statute of 23. H. 8. For it ought to have its beginning in the Court of the Bishop of *London*. And this exposition of the Statute is made for the Defendant, 94. Canon, which was expressly made against the Court of Arches, and inflicts suspension (by the space of three moneths upon the Judges which offend against it) from their Office, and awarded that Prohibition shall be granted, and with that agreed *Warburton* and *Foster*, Justices: but *Walmsley* Justice was of contrary opinion, that is, that no Prohibition shall be granted by the Court of Common Pleas, but in case where the Suit is there hanging. And this was objected also by the Civilians, And the opinion of the Judges of the Kings Bench cited to prove it, but prohibition was granted that notwithstanding. And to the objection that the Archbishop of *Canterbury* may have a consistory in the diocese of every Bishop, this was denied but only where he was the Popes Legate, and then as Legate he shall have Jurisdiction of all the Diocese of *England*, &c. it was agreed that there were three sorts of Legats. First, Legats, *a Latere*, and these were Cardinals, which were sent, *A Latere* from the Pope. The second, *A Legate* born, and these were the Arch-Bishops of *Canterbury*, *Torke*, and *Ments*, &c. And these said Legats may cite any man out of any Diocese within their Provincia; then there is a Legate given, and these have Authority by speciall commission from the Pope.

*Daringtons Case.*

**D***aringtons Case*, was cited before the high Commissioners of the King, for maintenance of the opinion of *Brownisme*, and for slandering of one Mr. *Eland* a Minister, and also of the Judges of the Common Law, and was sentenced, that for the first he should make his submission before the said Commissioners, and also for the second that he should make submission to Mr. *Eland*, and confesse his offence to him, and pray that he will forgive him; and so for the third also, that he should make submission, and that he shall be committed to prison untill he perform the said sentence, and put in security that he will not hereafter make a Relaps in any of the said offences; and after he made submission for the first offence according to the sentence, and upon complaint to this Court, *Habeas Corpus* was awarded to the Keeper of the Prison, in which he was to bring in his Body, with the cause of his taking and detaining, and he certified the causes aforesaid, but not the Submission; and these were the causes of the taking and detaining of the said *Darington*, and it was prayed by Serjeant *Nicholls*, that he might be delivered, and *Coke* cheife Justice said, that the Ordinary by the common

*Prohibition to  
the High Com-  
missioners,*

## Daringtons Case.

**Law**, nor by the Statute, *De circumspelte agatis*, cannot imprison for any offence, though it be for Heresie, Schisme, or other erroneous crime whatsoever, and then by the Statute of 5. R. 2. chapter 5. 2. Statute. It was awarded that Commissions should be directed to the Sheriffs and others, to apprehend such which should be certified by the Prelates to be Preachers of the Heresie; and the Favourers, Maintainers, and abettors, to keep them in strong Prison, untill they will justifie themselves by the Law of the holy Church: But this was repealed; by, 5 Ed. 6. 12. And 1 Eliz. 1. And also by the Statute of, 2 H. 4. 15. It was ordained that none shall preach or write any book contrary to the Catholique faith, or determination of holy Church, nor shall make any conventicles of such Sects and wicked Doctrines, nor shall favour such preachers: Every Ordinary may convent before him any person suspect of Heresie. An obstinate Heretick shall be burned in an open place before the People, and this Statute was also repealed by, 25 H. 8. And 1 Eliz. 1. By expresse words, and then by the Statute of, 1. H. 7. 4. Power is given to all Arch-Bishops, Bishops, and other Ordinaries having Ecclesiasticall Jurisdictions, to commit Clerks, Preists, &c. To Ward and Prison for Adultery, Fornication, Incest, or any other fleshly Incontinency, there to abide for such time as shall be thought to their discretions convenient for the quality and quantity of their Trespas, and these were all the Statutes, which give Authority to the Ordinary to imprison any man. And when the Statute of 1 Eliz. 1. Repealed the first two Statutes of 5 R. 2. 5. and 2 H. 4. 15. It was not the intent that these offences should be unpunished, but the Queen would not leave and trust the Bishop, which was but a man, and when he is made Bishop cannot be removed with such generall and uncontrollable Power, and Authority, and for that this power and Authority was transferred by the said Statute of 1 Eliz. 1. To high Commissioners, which the Queen might countermand at her pleasure, and appoint new, and so it was transferred from one to many, and this Statute did not intend to give other Authority to high Commissioners to imprison any man, which the Ordinary himselfe had not before the making of the Statute of 1 El. 1. And it was not the intent of the makers of the said Statute and Act of 1 Eliz. To alter any Lawes, but to transfer the power of one to others, and it was resolved that for working upon holy dayes, the party shall not be punished before the high Commissioners, in *Reimores Case*, and it was also resolved in *Symsones Case* by the Lord *Anderson* cheife Justice of the Common place, and *Glawville*, they then being Justices of Assise in the same place, that a Pursivant came with a Warrant of the high Commissioners to attach one by his Body for Adultery, in a lay mans house, and was slain, with great deliberation and conference had with

with the other Judges, that that was no Murder, but Man-slaughter, for they could not attach the Body of any man, but ought to proceed by citation, and excommunication: But it was agreed that they might imprison for *Brownisme*, for that was Herezie, besides he maintaind that if the King do not govern his subjects as he ought, that his Subjects may and ought to depose him, and other such abominable opinions, and further that he might fine for that, and he said that one *Elyas Brown* was hanged for that in the time of the last Queen, & for that, that it doth not appear by the return that *Darington* hath himself conformed, they could not deliver him, for they ought to give credit to the return, according to 9 H. 6. 46. be it true or not, and if it be not true, the party may have his action against the officer which doth it, and it was adjudged in *Fullers Case* in the Kings Bench that the high Commissioners may imprison and impose a fine for Heresie and Schisme, and it was also resolved that Poligamy before the Statute of the 3. of King *James*, was punishable before the high Commissioners, for this was an heynous crime, otherwise the Statute would not have made it Felony, and he said that it was agreed in the time of the last Queen *Elizabeth*, that the high Commissioners should not meddle with any thing but only those five, that is, Heresie, Schisme, Poligamy, Incest, and Recufancy, and with no others, and it was moved that a Writ, *De causione admit-tenda*, lieth, for that they would not allow of the submissions. And the Justices would consider of that, and the Prisoner was remanded, and it was adjourned.

And at an other day it was moved by *Nicholls* Sergeant, that the high Commissioners supposed, for that that the Statute of 5. *El.* gives authority to the Queen, and to her heires and successors, to grant Commission to Visite, Reforme, Redresse, Order, Correct, and amend, all Errours, Heresies, Schismes, Abuses, Offences, Contempts, and Enormities whatsoever; and that the Commissioners may execute all the premises according to the Tenure and effect of the said Letters Patents, that by that they might fine and imprison at their pleasure. But *Coke* cheife Justice said, that it appeares by the preamble of the said Statute, that after the Statute was in the 25. yeare of the Raigne of King *Henry* the 8. by which the ancient Jurisdiccions, Authorities superiorities, and Prehemenences, were united or restored to the Crown, and by meanes of the said Statute, his Subjects were continually kept in good order, and were dshurthened of divers great and intollerable charges and exactions, before that time unlawfully taken and exacted, untill such time as the said Statute of 25. H. 8. was repealed by the Statute of 1. and 2. of *Phillip* and *Mary*, which said Statute of 1. and 2. of *Phillip* and *Mary*, should be repealed and void, by which it appeares, that the

the Kings Subjects, were grievously burthened with grievous and intollerable charges and exactions, and yet in this time of usurped power of the Pope, doth not challenge that he might Commit, or Imprison, or Fine in any case, but in the cases especially mentioned in the last Case aforesaid, and for that all the usurped power was annexed to the Imperiall Crown, the which he called the clause of annexing, the second was the clause of deputation, and this was the clause of the Statute, by which the Queen hath power to grant Commission to such persons being naturall borne Subjects, as her Majesty, her Heires, or Successors, shall thinke fit, to Exercise, Use, and Execute, under her Majesty, all manner of Jurisdictions, Priviledges, and Preheminences, in any wise touching or concerning any spirituall Jurisdiction in all her Majesties Dominions, and to Visitt, Reforme, Redresse, Order, Correct, and amend all such Errors, Heresies, Schismes, Abuses, Offences, Contemps, and Enormities whatsoever, which by any manner spirituall or Ecclesiasticall power, authority, or Jurisdictions, can or may be lawfully Reformed, Ordered, Redressed, Corrected, Restrained: or amended, and the third he calleth the clause of execution, by which power and authority is given to the Commissioners to Exercise, Use, and execute all the premises according to the Tenure and effect of the said Letters Patents. And it seems it was not the intention of the Statute, to give any power to the Commissioners, which was not given to the Queen by this Statute, for the clause of deputation shall not be more ample then the clause of annexion, and then the clause of execution refers to the first too clauses, as it appears by the words of that (that is) to use and execute all the premises according to the said Letters Patents, and the premises are expounded by the first clauses, that is, Errors, Heresies, Schismes, &c. And the said Letters Patents, refer all Letters Patents before mentioned, where the persons are appointed to be naturall borne Subjects, and the materiall manner of Jurisdictions, Priviledges, and Preheminences, Ecclesiasticall, Spirituall, and to Visitt, Reforme, Order, Redresse, Correct, and Amend, all such Errors Heresies, &c. Which by any manner of spirituall or Ecclesiasticall, Power, Authority, or Jurisdiction, can or may lawfully be Reformed, Redressed, Ordered, Corrected, Restrained or Amended, &c. So that it cannot be intended that they may proceed in any other forme, but only according to the Ecclesiasticall power and Jurisdiction and no other, for otherwise they may Fine, Imprison, and ranfome any man at their pleasures, which was never intended by the makers of the said Statutes. But only to transfer the Power and Authority, which at that time was in the Bishops, which then were Papistes to the high Commissioners; the  
which



which the King may alter at his pleasure, and so he cannot the Bishops, for they are nor displaceable after their consecration.

Michaelmas, 8. Jacobi, 1610. in the Common Place.

A Man was cited before the High Commissioners for Poligamy, which was agreed to be a cause examinable & punishable there: and upon examination of the Cause, the Defendant was acquit, and yet he was censured to pay costs, though that he was acquitted of the Crime: and this Court was moved for a Prohibition, and it was denied; for they may hold plea of Principall, and then Prohibition shall not be granted for the accessary: and the Lord Coke said, that they have just cause of lawfulness of punishing the offence, though they have not just cause of the Deed, and peradventure it was very suspicious that he was guilty, and for that he hath only God for his revenger.

High Commis-  
sion.

### Parkers Case.

Three were cyted to appeare in the Court at Chester for Tenths, and treble damages demanded: and also in the Libell it is suggested, that the Land is barren, and very unfruitfull, and Prohibition was awarded against those joyntly; and yet it was agreed, that they ought to count upon the Prohibition severally.

Prohibition.

Joynt prohibi-  
tions and sever-  
all Counts.

### Penns Case.

Penn Parson of Ryton in the County of Warwick, sued for Tithes in the Ecclesiasticall Court before the Ordinary, and the Defendant here pleads that the same Parson was presented upon a Symoniacall contract, and for that his Presentation, Admission, and Institution were void, by the Statute of 31. Eliz. And the Symony was for that, that it was agreed between the said Parson and another man, that was Brother to the Bishop of Lichfield and Coventry, who was Patron of the same Church; That if he should procure three severall grants of three severall next avoydances, to them severally granted, to surrender their said severall grants, and procure the said Bishop to present him when the Church became void (that being then full of an old Parson being deadly sick) that he would make to him a lease of parcell of the Tithes of his Rectory: And the brother of the said Bishop procured the said Grantees to surrender their severall grants accordingly (the Church being then full.) And also after when the Church became void, he procured the said Bishop to present him according to the first contract, and then the said Penn made a lease to him

Prohibition up-  
on the statute  
of Symony, upon  
the stat. of 31.  
Eliz.



him of the Tenth; and after sued others of his neighbours in the spirituall Court for tithes, who pleaded the said Symoniacall contract, and here *Nicholls* Serjeant suggested, that the Judges Ecclesiasticall would not allow of this Plea there, but the Court would not give credit to this suggestion, but said, that if the Ecclesiasticall Court make exposition of the Statute of, 31 H. 8. Against the intent of it, that then they would grant a Prohibition, or if they should in verity deny to allow of this Plea, and for that advised him, that his Clyent might offer this Plea another time to them, and if they denyed to grant that, they would grant a Prohibition.

## Hurrey against Boyer.

*Prohibition upon the Statute of 32 H. 8. for the dissolution of the Hospitall of Saint Johns of Jerusalem.*

**I**N Prohibition awarded in the spirituall Court for stay of a Suit there for tithes of Lands which were the possessions of the Hospitall of S. Johns of Jerusalem, upon suggestion that the Prior of the said dissolved house of S. Johns had this priviledge from Rome which was by diverse Councells and Canons, that is, that the Lands of their Predecessors which by their own hands and costs they did till, they were tied to pay no tithes, and then by the Statute of 31 H. 8. chap. 18. Of dissolutions which was pleaded, but agreed that this Hospitall was not dissolved by this Act but by a speciall act made, 32. H. 8. chapter 24. By which their Corporation and Order was dissolved, and their possessions given to the King, with all the Priviledges and Immunities belonging to that, and the King granted that to the Plaintiff in the prohibition, and if he should hold them discharged of payment of Tithes, was the question; it was urged by *Harris* Serjeant that this Immunity was annexed to the corporation of the Prior and his Brethren of the said Hospitall, and that that was determined by the dissolution of the said Hospitall, and doth not come to the King, and he saith, that so it hath been adjudged in the Kings Bench, against the Booke of 10. *Eliz. Dyer* 277. 60. 2. *Coke* the Bishop of *Winchesters* Case 14. B. And the Arch-Bishop of *Canterburies* Case, 47. B. And 18. *Eliz. Dyer* 349. 16. And he said, that it was not given to the King by the Statute of, 31 H. 8. of dissolutions, for that was given by act of parliament, and this was not intended by the Statute of 31. H. 8. As it appears by the Arch-Bishop of *Canterburies* Case: *Nicholls* Serjeant argued to the contrary: And he cited a Cannon made by the Councell of *Mag.* and another made by *Innocent* the third, In the year 1215. And diverse others, and also the Statute of, 2. *Hen. 4.* 4. And 7. *Hen. 4.* 6. And he said that the Pope had Authority amongst spirituall men, and might grant to them freedoms of speciall things; and he saith, that if Land be discharged of payment of Tithes by prescription of not tithing, and this Land came to the King, yet this priviledge remaines, and also he urged, that these priviledges are given to the King by the

Statute

Statute of, 31 H. 8. Of dissolutions, by which all Hospitalls, as well dissolved, lost, surrendred, granted, or, &c. To the King, as those hospitalls which should be dissolved, lost, &c. And by this the possessions, lands, &c. are given to the King in the same plite and case, as they were in the hands of the hospitallers themselves; and he affirmed the Booke of 10. Eliz. Dyer 277. 60. To be good Law, and the Archbishops of *Canterburies* case 2. Coke 47. b. and the Bishop of *Winchesters* case 44. b. and 18. Eliz. Dyer. 349. 16. and also the words of the Statute of 32. H. 8. 24. gives to the King, not only the mannors, houses, &c. but also all Liberties, Franchises, and Priviledges, of what natures, names, or qualities soever they be, appertaining or belonging to the said Religion or the Professors thereof, by which he intends that this freedome to be discharged of tythes, and so concludes that the Prohibition shall stand, see the rest after, *Easter 9. Jacobi.*

## Forde versus pomroy.

UPON a Prohibition the case was this. An unmarried woman being proprietor of a Parsonage, tooke to a Husband, a Parishoner within the Parish, set forth and devided his tythes, and those immediately tooke backe, and the Husband alone sued for the treble value, according to the Statute of the 2. Ed. 6. And two points were moved. First, if that were a setting forth within the Statute, and by the Court that it was not, and so hath been adjudged in 43. and 45. of Eliz. and 1. Jacobi. If the Husband may sue for the treble value without naming his Wife, and to that the Court would be advised, for though, that the Husband may sue alone where a thing is personall, for which he sueth, as the bookes of 4. Ed. 4. 31. 7. Ed. 4. 6. 15. Ed. 4. 5. and 11. are; yet where the Statute saith, that the Proprietor shall have suit for the not setting forth, &c. The Husband is not intended Proprietor as the Statute intends, but the Wife, and for that the Wife ought to joyne, see more.

*For not setting forth Tythes.*

*Husband sue only.*

*Wagginer and Wood, Pasche 8. Jacobi, in the Kings bench.*

WAGGINER sued WOOD in the Court of Requests, for that, that WOOD had estopped his way, and in the Bill of complaint, there was no expresse of the place, the County, nor to what place the way did lead, and for that it was demurred to the Bill there. And notwithstanding they ordered the defendant WOOD to answer, and the Attorney came and moved the Court for a Prohibition,

*Prohibition to the Court of Requests.*

C

and

and it was granted to him, for they could not determine the right of a way.

*Glover and Wendham.*

*Against a For-  
reiner for Or-  
naments for  
the Church and  
for Sextons  
wages.*

**H**endyn of *Graves Inn*, moved the Court for a Prohibition, and the case was this. A man dwelling in a Parish, that is, Dale, hath land in his occupation in the Parish of Sale, the Wardens of the Church of the Parish of Sale, and other the Parishoners there make a Tax, for the reparation of the Church, for Church ornaments, and for Sextons wages, amounting to the sum of 23 *l*. And the Tax of the Church being deducted, commeth but to 3 *l*. only. And now the forreigner which dwells in Dale, is sued in the Court Christian, by the wardens of the Church of Sale, for his part of the Tax; and he praies Prohibition: and *Hendyn* saith he well agreed the case of *Jefferies* 5. *Coke*, that he should be charged if this Tax had been for the reparation of the Church only: for this is in nature reall. But when that is joyned with other things, which are in nature personall; as ornaments of the Church, or Sextons wages, with which as it seems he is not chargable, then Prohibition lies for all; *Flemming* cheife Justice: and *Williams* Justice, thought fit that he should not have a Prohibition: for as well the reparations of the Church as the ornaments of that, are meerely spirituall, with which this Court hath nothing to do, and: *Flemming* said, that such Tax is not any charge issuing out of Land as a rent, but every person is taxed according to the value of the land, but *Yelverton* and *Fenner* to the contrary, that a Prohibition did lye; for the same diversity which hath been conceived at the Barr; and also they said that he which dwells in another Parish doth not intend to have benefit by the ornaments of the Church, or for the Sextons wages, and for that it was agreed by all, by the cheif Justice; *Williams*, and the others, that if Tax be made for the reparation of Seates of the Church, that a forrainer shall not be taxed for that, because he hath no benefit by them in particuler, and the Court would advise.

Michaelmas, 8. *Jacobi*, in banco Regis.

*Admiralty.*

**H**enry *Yelverton* moved the Court for a Prohibition to the Admiralty Court: and the case was, there was a bargain made between two Merchants in *France*; and for not performance of this bargain, one libelled against the other in the Admiralty Court. And upon the Libell it appeared that the bargain was made in *Marcellis* in *France*.

*France*, and so not upon the deep Sea; and by consequence the Court of Admiralty had nothing to do with it, and *Flemming* cheife Justice would not grant Prohibition; for though the Admiralty Court hath nothing to doe with this matter, yet insomuch as this Court cannot hold plea of that (the contract being made in *France*) no Prohibition; but *Yelverton* and *Williams*, Justices, to the contrary; for the bargain may be supposed to be made at *Marcellis* in *Kent*, or *Norfolke*, or other County within *England*, and so tryable before us: and it was said, that there were many presidents to that purpose, and day given to search for them. Note, upon a motion for a Prohibition; that if a Parson contract with me by word, for keeping back my owne tithes for 3. or 4. years, this is a good bargain by way of Retayner; and if he sue me for my Tithes in the Ecclesiasticall Court, I shall have a Prohibition upon this Composition. But if he grant to me the Tithes of another, though it be but for a yeare, this is not good, unlesse it be by Deed, see afterwards.

Contract for  
retaining of  
Tithes.

## Westons Case.

A Merchant hath a Ship taken by a *Spaniard*, being Enemy, and a moneth after an English Merchant with a Ship called *little Richard*, retakes it from the *Spaniard*, and the owner of the Ship sueth for that in the Admiralty Court. And Prohibition was granted, because the Ship was gained by Battaille of an Enemy, and neither the King nor the Admirall, nor the parties to whom the property was before shall have that, according to 7 *Ed. 4.* 14. See 2. and 3. *Phillip* and *Mary*, Dyer 128. b.

Admiralty

Michael. 8. *Jacobi*. 1610. in the Kings Bench.

A Man sues an Executor for a Legacy in the Spirituall Court, where the Executor becommeth bound by his deed obligatory to the party, to pay that at a certain day, before which this suit was begun in the Spirituall Court; and the Executor moved for a Prohibition, and it was granted, for the Legacy is extinct: but by *Williams*, if the Bond had been made to a stranger, the Legacy is not extinct, *Fenner* seemed that it was so.

Prohibition.

Hillary, 1610. 8. *Jacobi*, in the Kings Bench.

*Robotham* and *Trevor*.

The Bishop of *Landaff* granted the Office of his Chancellor-ship to Doctor *Trevor*, and one *Griffin*, to be exercised by them, ei-

At the Archbishops  
discussed in  
right of Office.

ther joyntly or severally: and it was informed by Serjeant *Nicols*, that Dr. *Trevor* for 350*l.* released all his right in the said Office to *Griffin*, so that *Griffin* was the sole Officer, & after died: and that after that the Bishop granted the same Office to one *Robotham*, being a Practitioner in the Civil Law, for his life: And that Doctor *Trevor* surmising that he himselfe was the sole Officer by survivor-ship, made Doctor *Lloyd* his Substitute to execute the said Office for him, and for that, that he was disturbed by *Robotham*, the said Doctor *Trevor* being Substitute to the Judge of the Arches, granted an Inhibition to inhibit the said *Robotham* for the executing of the said Office, and the Libell contains, That one *Robotham* hindered and disturbed Doctor *Lloyd*, so that he could not execute the said Office. And against this proceeding in the Arches, a Prohibition was prayed, and day was given to Doctor *Trevor* to shew cause for why it should not be granted: And they urged that the Office was spirituall, and for that the discussing of the Right of that appertaineth to the Ecclesiasticall Courts: But all the Judges agreed, That though the Office was Spirituall, to the exercising of that, yet to the Right it was Temporall, and shall be tryed at the Common Law, for the Party bath a Freehold in this, see 4. and 5. of *Phil.* and *Mary*, Dyer, 152. 9. *Hunts* Case, for the Office of the Register in the Admiralty, and an Assize brought for that: and so the cheife Justice saith, which was adjudged in the Kings Bench, for the Office of the Register to the Bishop of *Norwich*, between *Skinner* and *Mynga*, which ought to be tryed at the Common Law. And so *Blackleeches* Case, as *Warberton* saith, in this Court for the Office of Chancellor to the Bishop of *Gloucester*, which was all one with the Principall case. And they said that the Office of Chancellor is within the statute of *Edw.* 6. for buying of Offices. And *Warberton* also cited the case of 22. *H.* 6. where action upon the case was maintained, for not maintaining of a Chaplain of the Chamber in the private Chappel of the Plaintiff very well, though it was spirituall, for the Plaintiff hath inheritance in that. But if it had been a parochial Church, otherwise it shall be for the infiniteness of the Suits, for then every Parishoner may have his action: And so in manner of Tything, the prescription is temporall, and this is the cause which shall be tryed at the Common Law, and Prohibition was granted according to the first Rule.

*Hilary* 8. Jacobi, in the Common Bench.

*Prohibition.*

**A**N Attorney of the Kings Bench was sued in the Arches for a Legacy, being Executor, as it seems, and it was urged that he inhabited



habited in the Diocess of *Peterborough*: And for that, that he was here remaining in *London* in the Term time, he was sued here, and upon that a *Prohibition* was prayed, and it was granted accordingly; For as the Lord *Coke* said, Though that he were remaining here, yet he was resident and dwelling within the Jurisdiction of the Bishop of *Peterborough*, and he said that if one Lawyer cometh and remaineth during the Term in an Inne of Court, or one Attorney in an Inne of Chancery, but dwelleth in the Country in another Diocesse, he shal not be sued in the Arches,

*Master, Brothers, and Governours of Trinity House  
against Boreman.*

**T**He Master, Brothers, and Governours of Trinity House sue in the Admiralty Court one *Boreman*, for that, that where *Queen Elizabeth* by her Letters Patents under the great Seale of *England*, bearing date the 36. yeare of her Reign, had granted to them the ballasting of all Ships within the Bridge of *London* and the Sea, and that no Ship shall take any ballast of any other but of them: And for that that the said *Boreman* hath received Ballast of another within the place aforesaid, hee was sued in the Admiralty Court. And upon that *Prohibition* was prayed; and day being given to hear both parties, the Master of *Trinity-house* came into the Court, and the Judges demanded of him for what end the said Suit was there begun, if it were to have the *Defendant* in Prison, or to have recompence, or for other purpose. But he could not give any answer to that: & upon that the Judges saying, that the place being alleadged to be at *Ratcliffe*, is within the body of the County without question, and for that for the place, shall be tryed at the common Law. Secondly, the Great Seale and Letters Patents of the King shall be expounded according to the course of the common Law, and the Admiralty cannot punish by Imprisonment, pecuniary punishment, nor otherwise. Thirdly, the *Letters Patents* are void, for, for that one charge is raised upon the Subject for the private gain of this private house; for they would not ballast any Ship under 2 d. for every tun of Ballast: But if the *Letters Patents* have been made for publique good, peradventure they had been good, but a *Prohibition* was granted. Note that the said *Boreman* was a *Dutch-man*, and his two Ships were arrested and stayed by the Admiralls Warrant out of the said Court, so that he was enforced to find sureties to answer to the said suit, before he could have his Ships at liberty.

*Admiralty for  
staying Ships  
for Ballast.*

*Huntly*

High Commis-  
sioners and their  
power in Mini-  
sting Oath  
and taking ob-  
ligation.

### *Huntley against Cage.*

**H**ENRY HUNTLEY was Plaintiff in the high commission Court against *Mary Clifford* Widdow Defendant, *Huntley* pretends that he was contracted to the Defendant, and upon that complains to the high Court of Commissioners, and that she would marry her self to *Cage*, and upon that the Arch-Bishop then did grant a Warrant to a Pursivant to attach *Cage*, and the said *Mary Clifford*, and upon that they were arrested by force of the said Warrant, and upon that they were committed to Prison, and being imprisoned, an obligation of 2000*l.* was taken by the said Commissioners of the said *Mary Clifford*, by which she was bound to the King with condition, that she should not marry her self, nor contract to any other, untill the same suit was determined in the same Court, and also to appear before the Judge of the Arches within nine dayes, after notice of that given.

And then being dwelling in *Holborn*, after that *Sir William Arm-  
stradder* obtained the said obligation of the King, pretending that that was forfeited; for that, that the said *Mary Clifford* had married her self to *Cage*, before that the said suite was ended and determined. And upon that the said *Mary Clifford* was another time cited before the high Commissioners, and a suit was there promoted against her (*Ex officio*) by *Serje* the Kings Proctor, also had the 4th part of all fines, and forfeitures which grew to the King, by reason of the Ecclesiasticall Courts; and then was articted against her; first, that she was married or contracted to *Cage*, & to that she refused to answer, for that, that it was the direct question upon which the forfeiture of the Bond depended, and then this Article was referred to some Doctors, who upon consideration seemed that the Article ought to be reformed, and upon that the Article was made that she lived single and unmarried in a house with the said *Cage*, which was as much as the first, for shee could not make any direct answer to that, without discovering whether the Bond were forfeited or not, and upon all this matter a Prohibition was prayed to the high commission Court, for the said *Mary Clifford*. And all the Justices, that is, *Coke* cheife Justice, *Walmesley*, *Warburton* and *Foster* agreed that the Obligation was void, for that it was taken by duress, of imprisonment, for they can not imprison any. Secondly that they ought not to examine any man upon his oath, to make him to betray himself, and to incur any penalty pecuniary or corporall, and *Foster* cited a Judgment in the *Exchequer*, in *Ralph Bowes* Case, where an *English* Bill was exhibited against one for bringing into *England*, Cards without license, and one which had a  
Monopo-

Monopoly upon that exhibited the said Bill, and upon that the Defendant demurred in Law upon that, and it was agreed that the Defendant shall not be compelled to answer to that upon his Oath, for that, that he had then incurred the danger of a penall Statute. Thirdly that they cannot take any obligation, by which a man shall be bound to appear in another Court, but only in the Court where the obligation is taken, no more then the Judges of this Court may take obligation of any man to appear before the Councell in the North: And *Walmesley* also seemed, that these high Commissioners ought to meddle only with things of the most high nature, and not of things which concern Matrimonie, and the ordinary Jurisdiction, and *Coke* said that the high Commissioners cannot meddle with any civill causes betwixt party and party, as keeping back tithes, or not payment of a Legacy, and lawfullnesse of Marriage, but the causes with which they intermeddle ought to be criminall, for otherwise they dissolve all ordinary Jurisdiction, and by their sentence every man shall be concluded, for he cannot appeal nor have any other remedy, and also he said that in civill causes, the high Commissioners, cannot send a Pursivant to arrest any man by his Body, for that was adjudged in *Humptons Case*, 42. Eliz. By *Anderson* and his companion, Judges in their circuit in the County of *Northampton*, with conference had with all the Judges of *England*, where the case was, a Pursivant having a warrant to arrest the body of one for Lasciviousness, and to have him before the high Commissioners, and a Constable came in aid of the said Pursivant in Execution of his warrant, and was slain, and was adjudged as before, that it was no Murder, and the reason was, for that, that the high Commissioners cannot award any warrant or proceesse to arrest the Body of any man, but if the warrant had been lawfully awarded, it was agreed that it should be murder, but as this case was, it was resolved to be but Man-slaughter, and also he said they cannot take in civill causes, where they have no Jurisdiction, but in criminall causes where they have Jurisdiction, it seems they may take obligation as the case requires.

But he would not dispute that nor affirm nor disaffirm it, but as the principall case was, the obligation was made by Dureffe, and so it may be avoyded, and also he seemed that they could not examine any lay man upon his Oath, But in causes Matrimoniall and Testamentary, and he said that so was the common Law before the making of that Statute of *Articulis cleri*. as it appears by a Canon made by *Ottamon* which was a Legate *A Latere* from the Pope in the 22 H. 3. and Canonically, by which is recited, that where such were drawn in length, because that lay men were examined upon their Oathes, and therefore it was provided that lay men should be examined upon their oathes,

Oathes, although it did not concern causes Testamentary nor Matrimoniall, the custome of *England* to the contrary thereof notwithstanding, see *Fitzherberts Natura brevium* 41. a. *Cromptons* Justice of Peace fol. 59. b. *Register* 36. b. and *Hyndes* Case 18. *Eliz.* or the Margin in *Scrogs* case *Dyer* 175. b. So also *Lamberts* Justice of Peace, that those things are to be given in Charge by the Justices of Assise, and *Coke* saith that the Writ in the *Register* was framed before the Statute of *Articuli cleri.* And also he cited one *Lees* Case, who was committed for hearing of a Masse, and refused to be examined upon that upon his Oath, and had a prohibition, and so he agreed that a Prohibition should be granted, and upon that it was awarded accordingly.

Note that a Prohibition was granted to the high commission Court, for that, that they examined the lawfullnesse of a Marryage.

### Symonds against Greene.

High Commission  
Clandestine marriage.

Note one suit was before the high Commissioners, and 16. were brought by Pursivants before them, for that that they were present at a Clandestine marriage, and it was urged, that this was not to be punished, by any inferior Ordinary, in any of their consistories; for the contract was made in the Diocesse of the Bishop of *Worcester*, and the marriage in the Diocesse of *Glocester*, and the Preist which married them, inhabited in the Diocesse of *Oxford*. And yet Prohibition was awarded, and the Justices were of the opinion, that every of them, for which the Pursivant was sent, might have an action of false imprisonment against him, for they cannot use any other processe but cytation only.

### Admirall Court.

Admiralty  
Court, if a  
thing done be-  
yond Sea shall  
be therein tried.

Note that it was urged by *Haughton*, that the intent of the Statute of 13, R. 2. chapter 5. Was not to Inhibite the Admirall Court, to hold Plea of any thing made beyond Sea, but only of things made within the Realme, which pertaines to the common Law, and is not in prejudice of the King or common Law, if he hold plea over the Sea; and that this was the intent of the Statute appeares by the preamble. But to this *Coke* saith, that the office of the Admirall was an ancient office, though it hath been otherwise conceived by some, for he hath seen Records and Libells and proceedings in the time of King *John*, where he was called *Marina Anglie*, in the time of *Ed. 3.* And also he said that the words of the Statute are in the negative. That is, that the Admirall nor his Deputy, doe not meddle from henceforth of any thing done within



within the Realme, but only of things done upon the Sea; and he said that it was adjudged in one *Wrights* case, that a thing made at *Constantinople* shall not be tried in the Admiralty, for it ought to be made upon the deep Sea, otherwise they shall hold no trial of that, see 48. or 50. of *Ed. 3. 2 Ed. 2 F.* obligation, and if a man be slaine or murdered beyond Sea, the offender shall not be punished in the Admiralty: *Walmesly* and *Warburton* Justices, agree, that if a thing be done beyond the Sea, and may be tried by the common law, there the admirall Court shall have no Jurisdiction. But if an obligation beares date beyond Sea, or be so locall that it cannot be tried by the common law there, if the Admirall hold Plea of that, Prohibition shall not be awarded, for it is not to the prejudice of the King, nor of the common law. But if the party can have his remedy by the common law, the common law shall be preferred. And if at the common law one matter comes in question upon a conveyance, or other Instrument made beyond Sea: according to the course of the civill law, or other law of the Nations where it was made; the Judges ought to consult with the Civilians or others which are expert in the same law; and according to their information, give Judgement, though that it be made in such forme, that the common law cannot make any construction of it.

Michaelmas 8. *Jacobi* 1610. in the common Bench.

**I**F a Parson agree & contract with me, that I shall keep back my own tithes if that be made after that I have sown my Corn, and for the same year only, this shall be good: and if the Parson sue in the spirituall Court for tithes, I shall have a prohibition; but if it be for more years then one or before the Corn be sowed, this shall not be good, by *Coke* and *Foster* against *Warburton*, and *Coke* said it was adjudged in the Kings Bench in Parson *Boothers* Case, that a contract made with a parishioner for keeping back of his tithes for so many years as he shall be Parson, was not good, and so it was *Wellowes* Case here also, but it was agreed by them all, that such a contract or agreement for the tithes of any other was void, but only of the party himself, which was party to agreement, and that ought to be made by way of keeping them back. See before, *Easter* 8. of *James*, See 20 *H. 6.* and the 21. *H. 7. 21. b.*

Agreement by  
word  
back tithes.

Pasche 1611. 9. *Jacobi* in the Common Bench.

**T**HE question was upon a motion to have a Prohibition to the President and Councell of *Wales*, if that shall be granted without action hanging. And *Coke* cheife Justice said, that the Record of the booke of 38. *H. 6.* agreed with the Report, and is witnesse,

where a Prohibition shall be granted without Action hanging.

D

*John*



*John Prisett*, and 2. *Ed. 4.* Is adjudged in the point; but yet he advised that there shall be information. *Walmesley* Justice said that this is no action. But *Coke*, *Foster*, and *Warburton* said, that it is an action sufficient, upon which a Prohibition shall be granted, and *Coke* said, that if they hold Plea of a thing, out of their Instructions; he would grant Prohibition without action hanging. But if they proceed in erroneous manner, in a thing which is within their Instructions, he would not grant Prohibition without action hanging, or Information.

*Sir William Chanceys Case.*

High Commis-  
sioners Alimo-  
ny, Adultery.

**S**ir *William Chancey*, was cited before the Ordinary of the Diocese of *Peterborough*, and sentenced to do Penance for Adultery; and this he commuted, and after that he lived in Adultery; with one in his house, and had two Bastards by her, and continued in Adultery with her for many yeares: and for that he was cited before the high Commissioners, and for that, that he would not allow his wife competent allimony; who had separated himselfe from her company, in respect that he lived in Adultery, as aforesaid; and for that, that he refused to become bound to performe the order and the sentence of the high Commissioners, he was committed to the Fleete, and he praied *Habeas Corpus* for his Inlargement; and also a Prohibition to be directed to the high Commissioners; and it was moved by *Nicholls* that fining is not Justifiable by the high Commissioners no more then Imprisonment; he sayd that he was cited out of his Diocese against the Statute of 23. *H. 8.* The which Statute is commanded to be put in execution by the Stat. of 1. *El.* Secondly, the offence that is Adultery, is not an Enormious crime, and for that shall not be punished by the high Commissioners, as it appears By the Statute of 1. *El.* But by the Ordinary. Thirdly, the high Commissioners by the Stat. of 1. *El.* ought to observe the same course and order in their proceedings, that the Ordinary used before the making of the Statute of 1. *El.* *Sci.* That they could not fine nor Imprison. But he agreed that the Statute 1. *H. 7.* gives authority to the Ordinary to Imprison for Adultery, but then the person ought to be Ecclesiasticall, so that he agreed, if Sir *William Chancey* had been an Ecclesiasticall person, the Ordinary might Imprison him for Adultery, and for Allimony they ought to give no remedy if the Husband would inhabit together with his wife; as he sayd Sir *William Chancey* desired. But if the Husband refuse to dwell together with his wife, or thrust her out of his house; and will not suffer her to dwell with him, then the Ordinary may compell the Husband to allow allimony for his wife; but the high Commissioners ought not to proceed upon that, for this is

no erroneous crime, for by that the party shall loose his benefite of Appeale, which he hath from the Ordinary, to the Metropolitan, for here the party cannot appeale to any, nor hath any remedy. If the Queen will grant Commission to renewe, and so he concluded that, for that these matters appeare upon the returne of the *Habeas Corpus* to be the causes of his commitment, he praied that Sir *William Chancey* might be delivered out of Prison: and prohibition of staying the proceedings of the high Commissioners. *Doderidge* the Kings Serjeant for the case of Sir *William Chancey* argued that the returne consisted of two parts. That is, Adultery and Allimony, and to the manner of the proceedings he would not speake; for he said that the Court had adjudged, that the high Commissioners by the Statute of 1. *Eliz.* Ought not to proceed upon any offences, but those which are Enormious; but he intended that the offence at the first was not Enormious, being but Adultery and Allimony, yet when Sir *William Chancey* was sentenced for that before the Ordinary, and then commuted his penance, and after that lived divers yeares in Adultery with two severall women, and had two Bastards; and then he became Incurable, and by consequence the offence is become Enormious, and is properly to be determined before the high Commissioners, and so praied he might be sent backe, and that no Prohibition should be granted; and at another day, *Foster* and *Warburton* said, that the high Commissioners ought not to meddle with these matters. Nor could not Fine nor Imprison for that: But *Walmesley* said that the Statute of 1. *Eliz.* Hath referred that to the discretion of the King, and the King by his Commission, hath given them power to meddle with that; and also he seemed that this was an Enormious crime for this is, against an expresse commandment, that is. Thou shalt not commit Adultery, and he intends there can be no greater offence then that, and it seems to him that the word Enormious ought not to be so expounded as it is expounded by the other Judges, that is, an Exorbitant crime, but Enormious is where a thing is made without a rule or against Law, for in every action of trespassse the word is used (*Et alia enormia ei intulit*) and yet these are not intended Exorbitant offences, but other trespassses of the nature of them, which are first expressed particularly, and so the Statute hath been expounded for many yeares, and to the Imprisonment he said, that the high Commissioners have Imprisoned for the space of 20. yeares, and though that the Statute doth not give power to them to Imprison, yet this is contained within the Letters Patents, and the statute hath given power to the King to give to them what authority he pleaseth by his *Letters Patents*, and for that, that it hath been used for so long

a time he would not suddainly alter that, but gave day till the beginning of the next Term for the argument of that. *Coke* cheif Justice said, that it was agreed by all that the Imprisonment was unlawfull; and if a Person be imprisoned which hath the Priviledge of this Court, this Court may deliver him without Bayle, for the King is the supream head by the Common Law, as to the coercive power, and that the *Letters Patents* of the King cannot give power to imprison, where they cannot imprison by the Common Law, and so it was adjudged in *Sympons Case*, 42. *Eliz.* Which was cited before the high Commissioners for adultery with *Fists Wife*, and adjudged there that they cannot imprison for that; and he saith that an exposition with the time is the best, and for that see the ninth of *Eliz. Dyer*, and the 18 of *Eliz.* And also it appears by the Statute of 5. *Eliz.* that awards a (*Capias excommunicatum*) which could not be imprisoned before that, and upon this Sir *William Chancey* was bayled; and after by meditation of the Metrapolitan, he was reconciled to his wife, and this was the end of this Businesse.

Pasch 9. *Jacobi* 1611. in the common Bench.

As yet Urrey against Bowyer.

**H**utton Serjeant argued for the Defendant, the question is, if lands which were parcell of the Possessions of the Hospitall of Saint *Iohns* of *Jerusalem* should be discharged of tythes by the statute of 31. *H. 8.* or 32. *H. 8.* in the hands of the Patentee, and he seemed that the priviledge was personall and annexed to persons of the said order; for it is confessed, that it came by reason of the order of the *Cistercians*, as appears by the Canon: The words of which are; that they should hold their lands, &c. Also it appears by the statute of 2. *H. 4.* 4. That it is personall by which it was enacted, that the religious of the order of *Cistercians*, that had purchased Bills to be discharged, to pay tythes, should be in the state they were before; by which it appears that it is annexed to their persons, and not to their lands, so that their Farmers cannot take benefit of that, Secondly, the priviledge was annexed to this order by canon, which is a thing spirituall; and hath no power to meddle with the lands of any man, but the proceeding of that ought to be by inhibition, or excommunication, see 11. *H. 4.* 47. 19. *H. 6.* 3. This priviledge by the canon which gives that, shall be taken strictly. And so is the opinion of their own expositors, see *Panormitan* Canon 37. So that there is an apparant difference between that and the lands, which came to the King by the statute of 31. *H. 8.* For by that the King is discharged of payment of tythes, and so are his Patentees. It seems to me, that the construction of the Cannon may be

be in another course different from the rules of the common law as it was adjudged in *Buntings case*; that a woman might sue a Divorce without naming her Husband very well, and 11. H. 7. 9. The pleading of the sentence, or other act done in the spiritual Court, differs from the pleading of a temporall act done in temporall Courts, and 34 H. 6. 14. a. Administration was committed upon condition, that if the first Administrator did not come into *England*, that he should have the Administration, which is against the Common Law; for there one authority countermands another: and 42 Ed. 3. 13. A Prior which hath such priviledge to be discharged of Tithes, makes a Feoffment, and his Feoffee payes Tithes to the Prior, and this was of Lands which were parcell of the possessions of Saint *Johns of Jerusalem*, and upon that he inferred that this priviledge is personall, and if it be so; it is determined by dissolution of the order as it is determined in, 21 H. 7. 4. That all Parsonages impropriate to them, by the dissolutions are become presentable and so of these which were annexed to the Templers, for these shall not be transferred to Saint *Johns*, though that the Lands are 3 Ed. 1. 11. By *Herle* accordingly *Fitz. Natura Brevium* 33 K. and, 35. H. 6. 56. Land given in Frankalmaine to Templers and after transferred to Hospitallers of Saint *Johns*, the priviledge of the Tenure is paid, and so shall it be in case of Tithes, being a personall priviledge that shall not be transferred to the King, and to the Statute of 32. H. 8. The generall words of that do not extend to discharge the Land of Tithes, though that the Statute makes mention of Tithes, if there be not a speciall provision by the Statute that the Lands shall be discharged, and this appears by the words of the Statute of, 31. H. 8. where the general words are as generall and beneficiall as the words of this Statute, and yet there is a speciall provision for the discharge of the payment of tithes, by which it appears that the generall words donot discharge that, and so the generall words of 1 Ed. 6. are as larg and beneficiall as the generall words of the Statute of 31 H. 8. And yet this shall not discharge the Land of payment of Tithes, and this compared to the Case of the Marquesse of *Winchester*, of a writ of Error, that, that shall not be transferred to the King by Attainder of Land in taile for treason by the Statute of 26 H. 8. or 33 H. 8. And so of rights of action; and so it was adjudged in the time of H. 8. that if the founder of an Abby which hath a Corrody be attaint of Treason, the King shall not have the Corrody; and he agreed that the Hospitall of Saint *Johns of Jerusalem* is a house of Religion for this is agreed by Act of Parliament, and the word Religion mentioned in the Statute more then seventeen times, and also it seems to him that the Statute of 31 H. 8 shall not extend to that, for this gives and establishes Lands which come by grant, surrender, &c. And



And that shall not be intended those which come by Act of Parliament, no more then the statute of 13 *Eliz.* extends to Bishops, 1. and 2. *Phillip and Mary, Dyer*, 109. 38. The statute of *Westminster* the 2. chap. 41. Which gives (*Contra formam collationis*) to a common person, founder of an Abby, Priory, Hospital, or other house of religion, without speaking exprelly of a Bishop; and yet it seems that this extends to an alienation made in Fee simple or Fee taile by the Bishop, 46 *Ed.* 3. Forfeiture 18. But it is resolved in the Bishop of *Canterburies* Case, 2 *Coke* 46, that the statute of 31 *H.* 8. shall not extend to these lands which come to the K. by the statute of 1 *Ed.* 6. to make them exempt from paying of Tithes, and to the Case in 10. *Eliz.* that is but an opinion conceived, and that the Prior hath this priviledge from *Rome*; and that the Farmer shall pay Tithes, and the question was in the *Chancery*; and upon consideration of the statute of, 31 *H.* 8. It seems that the Patentee himself shall be discharged (as long as by his own hands he tills it) and the statute of, 32. *H.* 8. Upon which the state of the question truly consists, was not considered, and also it was not there judicially in question. And to the case of *Spurling* against *Graves* in Prohibition, consultation was granted, for that, that the statute was mistaken, and so the award was upon the form of the pleading only, and not upon the matter, and so he concluded, and prays consultation, *Houghton* Sergeant to the contrar, and he agreed that it is a personall priviledge: and if the Order of *St. Johns* had been dissolved by death, that then the priviledg shall be determined, and this appears by the Stat. of 2. *H.* 4. 4. before cyted: and also the case of 10. *Eliz. Dyer*, 277. 60. did doubt of that: but he relyed upon the manner & words of pleading; that is, that *Hospitallers* are not held to pay Tithes, & it is as a reall composition made betwixt the Lord and another Spiritual person, of which the Tenants shall take advantage, as it is resolved in the Bishop of *Winchesters* case. Also as if a man grant a Rent charge, if the Grantee dye without Heir, the grant is determined: But if the Grantee grant that over, and after dyes without Heir, yet the Rent continues, 27. *H.* 8. Or if Tenant in tayl grant Rent in fee, and dies, the grant is void. But if he after suffers a recovery, or makes a Feofment, the Rent continues good till the Estate taile be recontinued, as it is resolved in *Capels* case. So here the order of *Templers* hath been determined by death, the priviledg hath been determined, but inso-much that the Land was transferred by *Parliament* to the King, this continues. Also the words of the Statute of 32. *H.* 8. are apt, not only to transfer all the Interest which the Pryor had in his Lands, but also his Priviledges and Immunities to the King; and he agreed, it is not material if the words *Tythes* are mentioned in the Statute or not. But the word upon which he relyes, and which comprehends this case,

*Houghton.*



case, is the word Priviledg, which takes away the Law; for where the Law binds them to pay *Tithes*, the priviledg discharges them: And the words of the *Statute* are taken in the most large extent, that is, all Mannors, &c. Priviledges, Immunities, &c. of what nature, &c. be they *Ecclesiasticall*, or *Temporall*, which appertain and belong, &c. by or in the right of their Religion; but the Priviledges and Immunities they have in the right of their Religion, and these the *Statute* of 32. H. 8. gives to the King, and there is no cause that they should surmount, or that the *Statute* should give to them more favour then the former *Statute* hath given to those religious houses which were dissolved by the *Statute* of 31. Eliz. For the *Hospitallers* of S. *Johns* were favourers and maintainers of the Popes Jurisdictions as well as the others, as it appears by the *Statute* of 32. H. 8. Also the words of 32. H. 8. hath only the words of the King and his Successors, and doth not speak of his Assigns, which words are expressed in the *Statute* of 32. H. 8. But it is provided by 32. H. 8. that the King cannot use at his will and pleasure, which amounts to so much. Also the *Statute* of 31. H. 8. extends to all Religious houses by expresse words: and it shall not be intended, that the intent of the makers of the *statute* was to omit that which were to be of the Order of S. *Johns* of *Jerusalem*, when the mischeif was in equal degree. And it hath been agreed that they are religious persons; and that they were under the obedience of the Pope, for so they are described in the *statute* of 17. R. 2. by which the possessions of the *Templers* was transferred to them, so that on the matter they are religious, which shall not be intended so largely, as every Christian may be said religious, but Secular, and Regular, which vow Obedience, Chastity, and Poverty; and for the proof of this, he cyted a president. Also it seems to him that the *Statute* of 30. H. 8. extends to those Lands which come to the King by the *statute* of 32. H. 8. And it is not like to the Arch-Bishop of *Canterburies* case, 2 *Coke*, 47. upon the *statute* of 1. Ed. 6. For that *Statute* gives the Lands to the King for other causes, and not for the same causes which are contained in the *Statute* of 31. H. 8. But the *Statute* of 32. H. 8. is for the same cause, and with the same respect to Religion. But if these Lands have come to the King by Exchange, or by Attainder, then they shall not be intended to be within the *Statute* of 31. H. 8. But if another *Statute* be made in 32. H. 8. by which all Religious houses have been given to the King, this shall be intended within the *Statute* of 31. H. 8. And the Judges before whom the cause depended judicially, ought not to be ignorant of that, and so he prayed that a *Prohibition* might be. *Shirley* Serjeant for the Defendant, at another day in *Trinity* Term 9. *Jacobi*, argued, that the question only depended upon the *Statute* of 32. H. 8. upon which the *Prohibition*

*Shirley,*

*hibition* is founded with the *Statute* of 31. H. 8. by which the Lands of Monasteries are given to the King, do not extend to those Lands which are given after by *Parliament*. But he intended that the Constitution which discharges the Templers of the payment of Tithes is spirituall, and extends only to spirituall persons which may prescribe in nottything; see 38. Ed. 3. 6. 2 of *Coke*, the Bishop of *Winchester* Case, 44. Also he intended when an appropriation was made to the Templers, that this is determined by dissolution of their Order. So upon the *Statute* of H. 5. of Priors Aliens, which have Improprations, or which have Rent issuing out of them; and after the Impropration is dissolved, the Rent is gone, for the Impropration is dissolved. Also he took exception to the pleading, for that, that it is only a branch of the *Statute* of 32. H. 8. And then by vertue of the premises he was seised, which is not good: and so hee concluded, that it was a good cause of demurrer upon the *Prohibition*, and prayed consultation. *Barker* Serjeant for the Plaintiff seems the contrary, and yet he agreed, that he could not take benefit of the *Statute* of 31. H. 8. for that, that these Lands came to the King by another *Statute*, but he relied upon the words of the 32. H. 8. which was made only for the dissolution of the Hospitall of St. *Johns* of *Jerusalem*, Tythes are as ancient as any thing that the Church hath, and before that any Law was written, for *Abraham* payed Tithes to *Melchisedeck*, but it doth not appeare that he paid the tenth part; but Tithes are due by the Judicall Law of God, and the King hath power to appoint what quantity shall be paid. But at the beginning there were Sacrifices, Oblations, and Tithes. And it was ordained by *Edgar*, King of this Realm, that Tithes should be given to the Mother Church. Also *Edmund*, *Ethelstone*, *William* the Conquerour, and the Councell of *Magans* specially provided that Tithes should be paid, but did not appoint when they should be paid. But the first Law which appointed the quantity was made in the time of *Edw.* 1. and this ordained when they ought to pay the Tenth with the feare of God. And it was resolved in *Fox* and *Cresbrooks* case in the Commentaries, after severance they are temporall, and Action lyes against him which carries them away, as of *Mortuary*, as it is resolved, 10. H. 4. 1. 6. And before the Councell of *Lateran*, every one might pay his Tithes to what person he would, and then were paid to Monasteries as Oblations: But of Tithes which are due to any by prescription, hee which payes them hath no such election, but ought to pay them to him which claims them by prescription, 14. H. 4. 17. If a Parson of a Parish claim Tithes in another Parish as portion of Tithes due by prescription to his Rectory, he ought to shew the place specially. So if Nunns prescribe to have a portion of Tithes, they ought to shew the place, for it is a question if they are spirituall, or not; for their

*Barker.*

office

office is only to pray in their house, 24. *Ed.* 3. So the book of Entries, if a man claim Tithes to his Pupil, he ought to shew in what place the Tithes lye, in the 17. *Ed.* 2. The order of the Templers was dissolved, and their possessions annexed to St. *Johns of Jerusalem*: and they did not claim by any Bull of the Pope, nor other spirituall Canon but by prescription, which is priviledg and private Common law, and this appears by the *Statute of Westminster*, 2 Chap. 47. That is, that they are conservators of his priviledges. Also he saith, that the *Statute of 2. H.* 4. discharges Farmers without speaking of Priviledges. And the *Statute of 7. H.* 4. 6. useth the same words which are contained in the *Stat.* of 32. *H.* 8. That is, that none shall put in execution any Bulls, containing any priviledges to be discharged of payment of Tithes. And *Mephams Canon* in time of *Ed.* 1. saith, *Let the custome be observed with the feare of God.* And another Canon, That custome of not Tything, or of the manner of Tything, if they paid lesse then the tenth part, see *Panormitan* upon that; seek of the Case between *Vesey and Weeks* in the Exchequer, upon the *Statute of 27. H.* 8. for the dissolution of small Monasteries. Also the Lord *Darcy in quo warranto*, was discharged of purveyance by Patent granted by the King *Edward 6.* of such priviledges which such a one had, and by the same reason the King shall be discharged of Tythes by the Act of *Parliament*; also he remembred the Book of 10. *Eliz. Dyer*, 277, 60. to be resolved in the point: and also 18. *Eliz. Dyer*, the Parson of *Pekerks* case, 399. 16. upon the *Statute of 31. H.* 8. and so concluded, and prayed judgment for the Plaintiffe, and that the *Prohibition* should stand, and it was adjourned.

Trinity 9. *Jacobi*, Priddle against Napper.

UPON a speciall verdict the cause was, The Prior of *Monutague* was seised of an Advowson, and of divers aeres of Land, and the 20. of *H.* 8. the King licensed him to appropriate that; and 21. *H.* 8. the Bishop which was Ordinary assented, and after that, the Church became void, that the Prior might hold it appropriate; and 27. *H.* 8. the Incumbent dyed, so that the Appropriation took effect, and was united to the possession of the Rectory Appropriate, and also of the Land out of which Tythes were due to the said Prior, in respect of the said Rectory, and then the Priory is dissolved, and the Impropiation and the Lands also given to the King, by the *Statute of 31. H.* 8. which granted the Impropiation to one, and the Lands to another. And if the Patentee of the Land shall hold it discharged of the payment of Tythes, in respect of that unity, was the question: And *Harris*, Serjeant for the Defendant, in the *Prohibition*, that the unity ought to be perpetuall and lawfull, as it was adjudged

judged between *Knightley* and *Spencer*, 2 *Coke*, 47. a. cyted in the Arch-Bishop of *Canterburies* case; and for that unity by, or by lease for years, or for two or three years, as in the case at the Barre, shall not be sufficient to make discharge of the payment of Tithes: and so it was adjudged, *Pasche* 40. *Eliz. Reg.* 454. between *Chyld* and *Knightley*, that is, that the unity of the possession ought to be of time, that the memory of man doth not run to the contrary. And in the argument of this Case it was said by *Popham* cheif Justice, that if no Tithes were paid after the *Statute*, that then it shall be intended, that no Tithes were paid before the *Statute*, and so he concluded, and prayed Consultation, see 2 *Coke* 48. a. The Arch-bishop of *Canterbury* for the reason by which unity of possession is discharged of payment of Tithes, that is, for that, that some houses of Religion were discharged by Bulls of the Pope, and many were founded before the Councell of *Lateran*: and for that it shall be infinite, and in a manner impossible to find by any searches, the means by which they are discharged; the unity is no discharge in respect of it selfe, for the reasons aforesaid, and none may know if Tithes were paid or not before the union: And if Tithes be not paid in time of memory by a house of Religion, and they lease of that for years, and receive Tiths, then the lease expires two yeares before the Dissolution of the same house, the King shall not be discharged of the payment of Tithes by the *Statute* of 31. H. 8. by *Coke* and *Walmesley*, against *Warburton* and *Foster*.

*Dorwood against Brikinden.*

UPON the *Statute* of 5 *Ed.* 3. a man libelled in the Spiritual Court for Wood cut, and a Consultation was granted; Yet the *Defendant* in the Court Christian might have a new *Prohibition*, if it appeared the first Consultation was not duly granted: So if a man libell for Tithes for divers years, and *Prohibition* is granted for part of the years, and after that a *Consultation* is awarded, yet the *Plaintiffe* may have a new *Prohibition* for the residue of the time, notwithstanding the *Statute* of 50 *Ed.* 3. and that it be upon one selfe same libel.

*Admirall Court.*

Court of Admiralty's Jurisdiction.

NOTE that the Admirall cannot imprison for any offence; but if the Court hath Jurisdiction of the Originall cause, and sentence is there given, this sentence may be executed upon the Land, 19. H. 6. But no Ordinary may meddle out of his own Diocesse, 8. H. 6. 3. 2. H. 4. The Parson of *Salt-ashes* Case; That this Court tooke notice of Jurisdiction of all Ecclesiasticall Courts, and Ordinaries, for they write



write unto them for tryall of Bastardy and Matrimony. And there are 3. Legates, First a born Legate, as the Arch-bishop of *Canterbury* and *York*, *Remes*, and *Pylazam*. Second, a *Latere*, as all Cardinals. The third a Legate given, as those which have their Authority, by commission, and *Lynwood* Provinc. saith, that the Arch-Bishop of *Canterbury*, as Arch-Bishop, cannot meddle out of his Diocese of *Canterbury* and his Peculiars, but as a Legate borne, which is in respect of his Office, he hath prerogative, and if a man inhabit in one Diocese, and ought to pay tithes to another which inhabits in another Diocese, there the Ordinary ought to prefer the suit to the Metropolitan, but seek what Ordinary shall transfer it.

Trinity 9. Jacobi 1610. in the *Common Bench*.

*Jones against Boyer.*

**H**ENRY Jones Parson of *Bishopton* sued *Bowen* the Executor of *Holland*, the last Incumbent in the Arches for Dilapidations, upon which a Prohibition was prayed upon the statute of, 23. H. 8. for that, that it was sued out of his Diocese, which was *Saint Davids*, but it appears that the Vicar generall of the same Ordinary hath made generall request to the Metropolitan, to determine that without shewing any cause speciall, and if the inferiour Ordinary may transmit any cause, but only for the causes mentioned in the statute of, 23. H. 8. And if the causes ought to be expressed in the Instrument, was the question: note that the generall words of the statute of, 23 H. 8. chap. 9. *Rastall* Citation 2. are afterwards many particulars, or in case that any Bishop or any inferiour Judge, having under him Jurisdiction in his own right and title, or by commission, make request or instance to the Arch-Bishop, Bishop, or other inferiour Ordinary or Judge, to take, treat, examine, or determine the matter before him or his substitute. And that to be done in case only where the Law-civill or Canon doth affirm execution of such request or instance of Jurisdiction, to be lawfull or tollerable, and for the better discussing of this question, the Judges had appointed to heare two Doctors of the Civill Law, which at this day attended the Court; the first Doctor *Martin* said, that these generall words have reference to the Executor, and not to the maker of the request, and this request may be made for all causes, but ought to be made to him, which hath concurrent or immediate Jurisdiction to which appeal may be made, and that the Arch-Bishop hath ordinary Jurisdiction in all the diocese of his Province; and this is the cause that he may visit, but this Jurisdiction is bound and tied up to the Ordinary, and when he will leave that at large, then the Arch-Bishop may proceed, as he is Arch-Bishop, and the cause of request need not to be contained in the Instrument, for when the power



which was bound up is unbound and at large, then he may proceed : Doctor *Talbot*, that the request is referred to three , to the Bishop, Dean, and Arch-Deacon. And the persons to whom the request is to be made are three : The Arch-Bishop, two Bishops, three, or superiour Judge, and the Bishop and his Commissary are all one , and request made by the Commissary shall be as good, as request made by the Bishop himselfe. Also that the President may transmit, and make request to the Emperour , as it appeares in the Booke of *Justinian* of the Lawes, 2. Book. So *Baldus* in reference made of inferiour Magistrates to Superiour, doth defend , that the Arch-Bishop is Judge of the whole Province , yet is bound. So *Speculata* in his Title of *Relations* , of which relation shall be made : So in the Councell of *Antioche*, that the Metropolitan is mediate Judge in the first part of the Canon , and for that relation shall be made to him. *Passonilis de officio*, &c. disputes : If the Arch-Bishop may have consistory in the Diocess of the Ordinary. *Hostiensis* , that the Ordinary may transmit a cause, though the parties be unwilling. *Panormitan in capite pastoralis*, 8. Question 6. decretalls of the Canon Law. *Philippus Francus* upon the decretalls of the Canon Law, That the Arch-bishop cannot meddle in the Diocess of any Ordinary without his assent. *Dominicans* upon the same Decretall : And so he concludes; that when the Ordinary makes a request to the Arch-bishop, hee may meddle without the assent of the parties, and the stranger, when the parties assent. And they agreed, that generally the Arch-Deacon ought to transfer to the Bishop, and so the Bishop to the Arch-bishop : But they agreed also that here in *England* it was prescription and usage, that every Arch-Deacon hath used to appeale immediately to the Arch-Bishop, and so ought the Request within this statute to be made accordingly. Also they agreed, that if a man inhabite in one Diocess, he hath cause to sue for Tithes in the same Diocess in which he inhabits : and in another Diocess, there he ought to sue in the Diocess where the *Defendant* did inhabite, and not where the Tithes are payable, nor where the *Plaintiff* inhabits, and the Principall case was ordered accordingly.

Michaelmas, 1611. 9. *Jacobi*, in the Common Bench.

*Enby*, versus *Walcott*.

**T**HE Defendant was sued before the Ordinary in the County of *Lincoln* for defamation. And the Suit was begun before the last generall pardon, *ex officio*, and the Costs taxed after the time limited by the pardon : and *Prohibition* was granted, in so much that all things promoted, *ex officio*, are discharged by the pardon ; and in so much as the principall was pardoned , the Costs being but as accessory shall be also pardoned , notwithstanding that they were taxed after the pardon.

*Powis*

## Powis against Bowen.

**U**Pon consideration had of Instructions given to the President and Councill of *Wales*, it was resolved by all the Justices of this Court, that the Councill there ought not to proceed upon English Bill, which contains title. But the forme of that ought to be onely, that the *Plaintiff* was in possession for three years: and that the *Defendants*, which ought to be alwayes more then one, riotously, and with force have entred upon him, and so ought to be restored to his possession. And in so much that the Bill contains Title in this case, and that the *Defendants* have entered upon him, and disseised him in forme of Assise, and doth not say riotously and with force, *Prohibition* was granted.

## Butler against Thayer.

**T**He Lord Admirall granted a Commission under the Seale of the Admirall Court to *Thayer*, for measuring of all the Corne which shall be transported from one Town or place to another within the Creeks, which are within the first Bridges, and to have so much for every bushell measuring, and granted, that if any resisted, to arrest them, and commit them till they had found sureties to appeare in the Admirall Court. And at *Milton*, and *Rainham* in *Kent*, *Thayer* endeavoured to put his Commission in execution, and *Butler* resisted him, and was for that arrested, and sued in the Admirall Court, and for stay of that prayed *Prohibition*, & it was granted, in so much that the Admirall hath not power to meddle with the first Bridges for civill causes, but only for Maymes and death of men: but for causes made upon the high Sea, where the Marriners have the better knowledg in the Common Law, he cannot try that: See the time of *Edw. 1. Avowry, 192. 8. Ed. 2. 45. Ed. 3. Stamford, 51. 7. R. 2. Statham Trespass.*

## Sir John Watts.

**C**ertain goods of a Subjects of the King of *Spains*, were forfeited upon the high Sea, and after were brought here into *England*, & there sold to Sir *John Watts*: and the goods were attached in the hands of Sir *John Watts* by Process out of the Admiralty, and there a libell was exhibited against the goods remaining in the hands of Sir *John Watts*, and Sir *John Watts* was not made party to the Suit. And Sir *John Watts* prayed a *Prohibition*, in so much that they bought them in open Market: And by this Suit in the Admirall Court, the property will be drawn in question there, where the Suite was prosecuted in the name of *Avelnso de Valasco* the *Spanish* Ambassador, Legier here. And *Prohibition* was granted. *Michael.*

Michael. 1611. 9. *Jacobi, in the Common Bench.*

*Jennings against Audley.*

*Prohibition.*

**P**rohibition was prayed to the Admirall, and the Libell shewed to the Court, which contained the Contract, was made in the straits of *Mallico*, within the Jurisdiction of the Admiralty, and doth not say, upon the deep Sea. And it was agreed, that in all cases, where the *Defendant* admits the Jurisdiction of the Admirall Court, by pleading there, *Prohibition* shall not be granted, if it do not appear by the *Lybell*, that the act was made out of their Jurisdiction; and that, though that Sentence was given, yet if that appears within the *Libell*, *Prohibition* shall be granted.

Note that a man was sued before the Ordinary in the Diocesse of *Norwich*, for infamous words, and after sentence there given, he appealed to the Arches: and the first sentence being there affirmed, he appealed to the Delegates; and before that the proceedings were transmitted, *Prohibition* was granted by this Court, in so much that the offence was pardoned by generall pardon. But this notwithstanding the Register transmitted the proceedings: And after for his fees due for that, hee exhibited a Bill in the Court of Requests, and *Prohibition* was prayed in this Court for to stay his proceedings there. And it was granted, in so much that the originall ground of the Suit, that is, the infamous words were pardoned by the generall pardon; and for this all the proceedings were erroneous, and their transmitting after. And afterwards the *Prohibition* received willingly; And for these causes *Prohibition* was granted to the Court of Requests.

*Thomas Baxter against Thomas Hopes.*

**I**N Prohibition the Plaintiff Suggests, that within such a Town was such a custome; that every Inhabitant which maintained a family, and dairy, for manuring his land, and maintenance of his family, have used of time out of memory, &c. to pay tythes of Corn, growing upon his Farm, in kind, and by reason thereof have used to be discharged of after crop, of the said land. And also that they have used to pay tythe milk, and tythe Calves in kind, and by reason thereof have been discharged of tythe of yong and barren Beastes, and the Plaintiff suggested further, that he occupied a Farm and maintained a family, and dairy, for the manurance of that, and maintenance of his family; and hath paid his tythe Corn, and milk, and Calves, in kinde: And for that ought  
to

to be discharged of tythes for the after crop, and for yong and barren Beastes, and for the tenthes of which, suit was begun in the Court Christian, and upon demurrer joyned upon Prohibition, the custome was debated whether it were good or no, and it was moved first by *Houghton* Serjeant for the Defendant, that the custome was not good, insomuch that by that the Plaintiff was not to pay more, then by the Law he ought, for he ought to pay tythe Corne, and milk and Calves, in kind: And this is no more then the Law compells him to do, and this cannot be a consideration to discharge him of other things. For all things which renue ought to pay tythes, of Common Right, as after pasture, and barren Cattell, and Corne, and milk. And all other things which renue; if it be not good custome to the contrary, which is groundd upon consideration; and then to consider how much consideration shall be valuable in other Cases, and what not: And to that it appeares in *9. Ed. 4. 18. and 19;* in Trespasse upon the Statute of *5. Rich. 2.* The Defendant pleads accord, that the Plaintiff entred into his land againe, and agreed that that was not barr, insomuch as agreement without satisfaction is not barr, and entry into lands, is no more then he might do without the agreemeit, and for that it is not good for default of consideration; so in *12. H. 7. 15. 4.* in trespass for goods taken; the Defendant pleads arbitrement, that is; for that that the Defendant, hath taken the goods of the Plaintiff, and that he should deliver them to the Plaintiff, in full satisfaction: And agreed that this is no good award, insomuch that this cannot be satisfaction, for that that the goods were the proper goods of the Plaintiff: And although, that he hath his goods againe; yet he is not satisfied for the taking. But if the award had been, that the Defendant should redeliver his goods, and carry them to such a place certain, at his own costs and charges, then it had been good: See *45. Ed. 3.* accordingly. So in an action upon the Case, upon an Assumpsit made in consideration that the Plaintiff hath payd due debt, is not good, for this is no consideration, and so in the principall Case the Prescription is not good, insomuch that he hath not suggested more or other consideration, which by the Law he ought to do: But he agreed that if he had suggested, that the Plaintiff, had plowed and manured the land, and disposed of the tythes of the Corn, for the benefit of the Parson, in other manner then the Law compelled him; then the first prescription had been good, and so he concluded, and praied Judgement for the Defendant: *Hutton* Serjeant for the Plaintiff, in the Prohibition seems the contrary, and that the Suggestion, and Prescription, and Custome, Contained in that are good: And to the Objection, that it is

no.



no consideration, that the Custome may be founded; he intended, that this is a ground upon immunity subsequent to the Consideration, as of things which are not tythable, as in the generall Case of things, which are for the maintenance of the family; for Plowing and Manuring of the land, shall not pay tythes, as in a suit for tythes for herbage, suggestion that they were depastured, by labouring Cattell, which Plowed and Manured the Land, of which the Parson had tythes, or small Wood, which are cut or employed for the fencing of a Farm, or fuell spent in the Farme, shall not pay tythes; insomuch that without that, the Farme cannot be Manured nor the Famaly sustained. And so by consequence the Parson shall not have any tythe Corn, insomuch that no Corn will grow without manuring; and also the Parson by those hath the more tyth Corn, and so he hath consideration in that, for the better that the Farme is fenced and manured the more tythe the Parson shall have: So the Farmer may be discharged of tythes, for Rakeings, insomuch that he Mowes and Cocks the tythes for the Parson at his own costs, and this is sufficient consideration: And also he insisted upon the Statute of 2. Ed. 6. Which provides that tythes shall be payd in the same manner, as they were payd for 40. yeares before, and he cited one *Jessopps* case to be adjudged in Prohibition; Pasche 36. Eliz. Upon suit in Court Christian, for flocks, and locks of Wooll: And the Custome was alleaged, that the owner had woond the tythe for the Parson, and in consideration of that, ought to be discharged of tythes, of locks and flocks, if they be not made by Covin, to defraud the Parson; and these were demanded by the name of wooll dispersed, and 18. Eliz; it was adjudged, that tythes shall not be made for Brick, and in Prohibition; the suggestion was grounded upon the generall immunity, and insomuch that it was made of land, for which no tythes are to be payd; insomuch that it doth not renue, that for this cause tythes ought not to be payd, for the Brick which is made of that, and so of Mynes, and so Loppings, and Toppings, and bark of Trees shall pay no tythes: But are within the Statute of 40. Eliz. 5. of wood to be false, as it is resolved in *Soby and Molyns* case in the Commentaries: And he agreed that for herbage the tenth gate, or profit of that ought to be payd, if there be not a custome to the contrary; but in the Principall case he intended that that was payd in the Corn, and in that the Parson hath recompence and consideration as before, and so he concludes and praies Judgment for the Plaintiff: *Dodrigde* Serjeant of the King argued that the Custome is not good, as it is here suggested, for the consideration is of some things which ought to pay tythes in kind, and so upon the matter is no  
confide-



sideration at all, for he intended that tythes should be due by divine right, as due by the Manuring and Tillage of the occupier, in whose soever hands that the land commeth; if it be not in the hands of the Parson himselfe, 30 H. 8. 43. *Dyer*. 20. And for that a Parson shall have tythes against his own Feoffment, 43. *Ed.* 3 13 a. 1. *Coke*. *Albanys* case, 111. a. 32 H. 8. B. Tythes the 17 accordingly, and unity of possession shall not extinguish them: And also he intended there are two manner of persons, which are discharged of payment of tythes. One Spirituall, the other Temporall, the spirituall in respect of their Order, and the temporall in respect of Custome and Prescription, and also by grant, as it is agreed in the Arch-Bishop of *Canterburies* Case, 2. *Coke*; but this is in the case of a spirituall man before the Statute of, 32 H. 8. which was capable of them in taking, and that he might prescribe in not Tithing, but a lay man cannot be discharged but for satisfaction and consideration, for he cannot prescribe in not Tithing, and for that in the case here the thing to be considered is, if it be sufficient satisfaction and consideration, and to that he intended that the payment of a duty, that is Tyth Corn and Tyth Hay, cannot be satisfaction & consideration for another duty, and this was the Reason of *Piggot & Hernes* Case, that the Lord of a Mannor, in consideration of 20. Nobles yearly paid to the Parson, prescribes to have the tithes of a Hamlet, and in consideration of that, the Lord himself and his Tenants, were discharged of payment of Tithes, but there the consideration and satisfaction was the cause which made the custome good, see 2. *Coke* 45. a. And then he proceeded and examined the manner of the satisfaction in the principall case, which is, that the Plaintiff shall pay tyth Corne and Hay, and nothing for Milk and Calves, but by reason thereof shall be discharged, as if he should say, that because he payeth tythe Corne, therefore he shall pay no tithe Milk, and he intended that the nature of satisfaction is to give content to the party, as if the prescription had been, that the Plaintiff should pay so much Money, and in consideration of that, or that he shall make the tithe in Cocks, or rake it, or mow it at his owne charge, this is a good prescription, and there are diverse presidents of that, but no president is of this forme, as the case here is; for money shall be intended the greater value, and more beneficiall for the Parson, then his Tithes in kind, and Money is the value of every thing, and may give contentment to the party which receives it, & he cited Bookes of, 9. *Ed.* 4. 19. and 12 H. 7. 15. and 21 H. 5. 2. a. To the same intent which were cited before by *Haughton*, that is, which agree in Arbitrement, and the Plaintiff entred into his own Land, or that the Defendant delivered to the Plaintiff, his own goods which the Defendant had taken from him, it is not good;

*Modus decimandi.*

for it cannot give contentment to the party, otherwise it is, if it be that the Defendant shall carry them to another place and there shall deliver them, for it cannot be satisfaction and contentment to the party, and for that, that here the Plaintiff hath not made more then the Law compells him, and that it was his own duty, and for that the prescription wants consideration, it shall not be good, and also by reason thereof it can be no good discharge, for this cannot be satisfaction, but he said, it was adjudged *Pasch 20 Jacobi* between *Hall* and *Aubery*, that Money was a good consideration and satisfaction for tithes, and so he concluded and prayed judgment for the Defendant; note that this cause was adjudged *Hillary 8. Jacobi* upon solemn argument by all the Judges with one voice, that the Prescription was good.

*Haughton* Serjeant moved for a Prohibition, for that the Suit was begun in the Admirall Court upon Charter party made beyond Sea upon the Land, and Prohibition was granted, though it be for a thing made in *Paris*, or in another place beyond the sea, if it be not upon the Main Sea, but if the Defendant there admitts the Jurisdiction of the Court and suffers sentence, then the Court will not upon a bare surmise grant a Prohibition, after the admittance of the party himself, if it be not in a thing which appeareth within the Libell, that is, that the Act was not made within the Jurisdiction of the Sea, and to this difference all the Court agreed.

*Prohibition to  
a Court Bayon.*

If a Court Baron divide a Debt of thirty pound in severall parcells under forty shillings, and so proceeds in severall Actions, Prohibition shall be granted, see *Fitzherberts Natura brevium*, and 19 H. 6.

*Hane* was cited out of his Diocesse into the Arches, and he pleaded to the Libell, and sentence is given against him for costs, and after that Prohibition was granted, and upon that consultation was prayed, for that, that the Defendant was the party grieved, and ought to have pleaded the Statute, inasmuch that the Statute was made for his benefit, but if it appears by the Libell that the Court of Arches need not to have Jurisdiction, then it seems that the Prohibition was well granted, as in *Sir Henry Vinors* Case, he began a suit in the high Commission Court, for the not serving of a Chappell, and the Court understanding that they had no Jurisdiction, remitted the cause to the Ordinary, and yet gave sentence against *Sir Henry Vinor* which was Plaintiff for Costs, and for that he prayed a prohibition and it was granted to his Petition notwithstanding that he himself was the party, who begun the suit there, as it was remembered by *Nicholls* Serjeant:

A Woman sued in the spirituall Court for Defamation, and the words

words were, That thou mayest be an honest woman but thou playest too much with a thing, &c. And Prohibition was prayed, insomuch that these words were not Actionable; for in *Spellmans* reports Prohibition was granted, for that they proceeded there for calling a Minister Knave Preist, and also by these words, a white Cloake is more fitter then a black cloake for him, for action upon the case doth not lye for these words by any Law, but the Prohibition was not granted.

## Pasch. 11. Jacobi Prohibition.

## Tey against Cox.

**P**rohibition was prayed, for that, that one was cited out of his Dioceffe before the Arch-Bishop of *Canterbury*, as Keeper of the Spiritualities in time of the vacation of the Bishopp-rick, and it was denied; but if he had beene to appeare before him as Metrapolitan, otherwise it should have been, insomuch that this is against the Statute of 23. H. 8. And also for his own Canon, but in this case the Statute of, 23 H. 8. And also their own Canon; but in this case the ArchBishop hath done as he ought, and for that the Prohibition was denied, see 17 *Ed. 2. Fitz. Na. Bre.* 822. and 41 *Assf.*

The case was this, there was a custome that a Park hath paid two shillings a yeare, and the holder of every Deere which was killed for tithes, and in consideration of that, had been time out of minde, &c. Discharged of Tithes, and now the Park is dis-parked, and it was moved by *Harris* Serjeant, that this dissolves the custome, for when part of the custome is dissolved by the party himself, this determines the residue, for it is adjudged if the Land be discharged of tithes by reall Composition, then if he sue for tithes in the spirituall Court, prohibition by the common Law was granted, without other suggestion, but only that he sued there for Lay Fee, and it was said that it was adjudged 5. *Jacobi*, that where it was a custome that so many of the bucks shall be paid for tithes in such a park yeerly, and after the park shall be disparked, yet that remaines discharged of Tithes, and the custome remaines, and *Coke* cheif Justice seemed that tithes are due by divine right, but not what part, for if the tenth part be due dy divine right, then all Customes are void.

Trinity, 11. Jacobi, 1612. in the common Bench.

**N**Ote by the *Statute* of 50. *Edw.* 3. If a Consultation be once duly granted, no new *Prohibition* shall be afterwards granted upon the said Libell. But if it be apparent matter that the first was not duly granted, then a new *Prohibition* may be granted by the whole Court, and with this agreed the book of *Entries* in the Title of *Prohibition*: But this is to be intended to the Spirituall Judge; and it seems that the Admirall is out of this *Statute*, see 22. *H.* 7.

Bushes Case.

**N**Ote that it was agreed in this Case, that if a Parsonage be impropriate, and the Vicaridge be endowed, and difference be between the Parson and the Vicar concerning the endowment, that shall be tryed by the Ordinary, for the persons and the cause also are spirituall: And there the Vicar sues the Parson for *Tithes*, and he suggests the manner of *tything*, and prays a *Prohibition*, and it was granted, and after upon solemn argument, *Consultation* was granted, in so much that the manner of *tything* did not come in question; but the Endowment of the Vicaridge only, for that is the Elder Brother, as the Lord *Coke* said; and this was cyted to be adjudged by *Coke*.

*Prohibition.* Agars Case.

**A**Gar of *Kingston* upon the Thames was sued in the Ecclesiasticall Court for beating of his Wife, and for calling her Whore, and was sentenced by them to pay to his Wife three shillings a weeke for her Alimony, and divers Fynes were imposed upon him for not performing of that, and also provided that hee should enter into a Recognizance for performance of that, and a *Prohibition* was granted, and also a *Habeas Corpus* to deliver Agar out of Prison:

*Michael.* 8. Jacobi, *Blackdens* Case.

**B**lackden married one within age, and after disagreed, so that they might marry else-where; and the first Wife had Issue by other Husbands, and dyed, and *Blackden* was sued in the Ecclesiasticall Court by an Informer, supposing he had married a woman, living his other Wife. And *Blackden* proves there the disagreement, by which he had sentence for him against the Informer, and yet hee was taxed to give to the Informer twenty markes for costs, which hee refused to pay, and moved to have a *Prohibition*, which was granted.

For

For it was injustice to allow Costs to one which had vexed him without cause, and when they had given sentence against the Informer.

*Parker's Case, Michael. 8. Jacobi*

**P***arker* being a Parson of a Church, was deprived by the High Commissioners for Drunkennes, and moved for *Prohibition*, but it was not granted; and he was directed to have action for the Tythe, and upon that the validity of the Sentence shall be drawn in question.

*Doctor Conways Case, Michael. 8. Jacobi.*

**C***onway* and his Wife were sued before the High Commissioners, that is to say, the Wife for Adultery with Sir *Michael Blunt*, and the Husband for connivency to that, as a Wittall, and they were sentenced there for that, and costs taxed in *July*; and after the general pardon came, and pardoned all offences before the 9. day of *November* before, and upon that the Doctor moved for *Prohibition*, and had that, because the offences were not enormous crimes, and the Statute, and the Commission upon that is to give power to them to proceed upon enormous crimes, and to Fyne and Imprison for them. Also resolved that the generall pardon hath discharged the Costs, though that the Costs were taxed before the Pardon was in Print. And this by the relation that hee had at the day before the Costs were taxed.

*Cradocks Case, Michael. 7. Jacobi.*

**C***radock* bought diverse things upon the body of the County, which concerned the furnishing of a Ship, as Cordage, Powder, and Shot, and the party of whom they were bought sued *Cradocke* for the money in the Admirall Court, and *Prohibition* was granted; for the Statute of *Richard 2.* is, that the Admirall shall not meddle with things made within the Realm, but only of things made upon the Sea, and that no Contract made upon the Land shall be held there. And here the Contract was at *St. Katherines* stairs in the body of the County; for it was said that *St. Katherines* is within *London*, and the Major of *London* hath jurisdiction upon the Thames as farre as *Wapping*. And if a Murder be committed upon the Thames, this shall not be tryed by the Admirall: and here *Terry* and *Peacock's* Case was cyted, which is related in *Binghams* case in the 2. Reports, and also in *Sir Henry Constables* Case in the 5. Reports, and it was cyted to be adjudged, that if a Contract be made at *Roan* in *France*, that shall not be tryed in the Admirall Court, for that it was made, upon the Land, and not upon the high Sea.

*Pasch.*



*Pasche 8. Jacobi Regis, Common Bench.*

*Gaudyes case with Doctor Newman.*

**T**He Parishioners of the Parish of *Alphage* in *Canterbury*, prescribed to have the Nomination and election of their Parish Clark, and the Parson of the Parish by force of a Canon, upon voidance of the place of the Parish Clark elected one to the Office; the parishioners by force of their Custome elected *Cundy*, the Parson supposing this election to be Irregular, for that it was against the Canon; sued *Cundy* before Doctor *Newman* Chancellor of *Canterbury*, and the said *Cundy* was by Sentence deprived of the Clark-ship of the Parish, and the Clark of the Parish admitted; *Cundy* moved for a Prohibition, and had it granted by all the Court, for it was held that one Parish Clark is a meer lay man, and ought to be deprived by them that put him in, and no others; and if the Ecclesiasticall Court meddle with deprivation of the Parish Clark they incur a Premunire, and the Canon which willeth that the Parson shall have election of the Parish Clark, is meerly void to take away the Custome that any Parish had to elect him. See the Statute of 25 *H.* 8. That a Canon against Common Law confounds the Roiall Prerogative of the King, or Law of God, is void; and Custome of the Realme cannot be taken away but by act of Parliament. See 21 *Ed.* 4. 44. the Abbot of *Saint Albones* hath a Charter of the King, to be discharged of Collection of tenthes granted by Parliament or Convocation: The Clergy grants tythes in Convocation, there is a clause in the grant that no one of them who shal be chosen to be collector, shal be discharged of collection by colour or force of any Letters Patents, and after they return the Abbot of *St. Albones* Collector, who pleads his Letters Patents in discharge of Collector, and resolved by the Court that the clause in the grant of tenthes doth not take away the exemption of discharge by the Letters Patents granted. And it was resolved that if the Parish clark misdemeane himselfe in his office, or in the Church; he may be sentenced for that in the Ecclesiasticall court to Excommunication, but not to Deprivation: And after Prohibition was granted by all the court, and held also that a Prohibition lyeth as well after sentence as before.

*Trinity 8. Jacobi, Common Bench.*

**O**N was cited to appear in the Prerogative Court of *Canterbury*, which was out of the Diocesse of *Canterbury*, and upon that he

he praied Prohibition upon the Statute of 32. H. 8. Which willett that none shall be cited to appeare out of his Diocesse, without assent of the Bishop, and Prohibition was granted: And yet it was said that in the time of H. 8; and Reigne of *Mary*, that the Arch-Bishops of *Canterbury* had used to cite any man dwelling out of his Diocesse, and within any Diocesse within his Province, to appeare before him in the Prerogative Court, and this without the assent of the Ordinary of the Diocesse: But it was resolved by the Court, that this was by force of the power Legantine of the Arch-Bishop, that as *Lynwood* saith, ought to be expressed in the Prohibition, for the Arch-Bishop of *Canterbury*, *Tork*, *Pisa*, and *Reymes* were *Legati nati*, and others but *Legates a Latere*.



Hillary, 1610. 8. *Jacobi*, in the Common Bench.

Beareblock against Reade.

**I**N an Action of Debt brought by *Beareblocke* against *Reade*, Administratrix to her Husband, upon a Judgement given in this Court: The case was this, the Plaintiffe had Judgment against the Husband, and after sued him to an *Utlagary*, and upon that he brought a Writ of Errour, and removed the Record into the Kings Bench, and reversed the Judgement for the *Utlagary*. But the first Judgement was affirmed; and then the Husband acknowledged a *Statute*, and dyed: And the Wife took out Letters of *Administration*, and then the *Statute* is extended against the Wife, and all the goods which shee had of the Intestates taken in execution. After which *Beareblock* in the Kings Bench sueth a *Scire facias* upon the said Judgement against the said Administratrix, to have execution, and shee pleads upon that, the said *Statute* in Barre, and the extent of that, and that more then that, shee hath nothing to satisfie, and this was adjudged a good plea. And then the *Plaintiffe* being not satisfied, he hrought an action of debt upon the said Judgement in this Court, and in Barr of that, the Wife pleaded all this matter in Barr, as afore-said, upon which the *Plaintiffe* demurred in Law, and the Judges seemed to incline that this was no Barr; for though that the Wife hath not any means to aide her selfe, or to prevent the extent of the *Statute*, yet it seemed to them that this should not prevent the execution.

execution upon the Judgement, and that the Wife might have *Audita querela* against the Connusee of the *Statute*; and so to make the extent void. It was not argued at this day, but the point only opened, see 3. *Eliz. Dyer*, 7. H. 6. See *Pasche* 9. *Jacobi*, the Residue.

Petty against Evans.

**I**N an *Ejectione firme* brought by the Lessee of a Copy-holder, it is sufficient that the count be generall without any mention of the License, & if the *Defendant* plead not guilty, then the *Plaintiff* ought to shew the License in Evidence: But if the *Defendant* plead specially, then the *Plaintiff* ought to plead the License certainly in his replication, and the time and place when it was made: and in this case the *Plaintiff* replied, that the copy-holder by License first then had of the Lord did demise, and did not shew what estate the Lord had, nor the place nor time when it was made, and all the Justices agreed that it is not good: For the License is traversable, for if a copy-holder without License of the Lord make a Lease for yeares. The lessee which enters by colour of that, is a Disseisor and a Disseisor cannot maintain an *Ejectione Firme*, and the *Defendant* cannot plead that the *Plaintiff* by license did not demise, for this is a pregnant negative, also it ought to appeare what estate the Lord had, for he cannot give license to make a lease of longer time in the Tenancy then he hath in the signiory: And for that if he be Lessee for life of a Mannor, and he licenses a copy-holder to make a Lease for 21. yeares of a copy-hold, and then the Lessee for life dies, the license is for that determined, though that the copy-holder be of Inheritance, for the Inheritance of the Lord is bound by that. And for that the *Plaintiff* replies, that the copy-holder by license of the Lord first therefore had, made the Lease, that is not good, by *Coke* and *Walmesley* exprelly, and though that the *Defendant* confesse the Replication, by Implication, by pleading. Yet this shall not ayd the *Plaintiff*, for that it is insufficiently pleaded, which note.

Hillary 8. *Jacobi* 1610. in the *Common Bench*.

**I**N action upon the case upon an Assumpsit, the *Plaintiff* counts that when he such a day at the speciall instance and request of the *Defendant*, lent to the *Defendant* the same day ten pound; And that the *Defendant* the same day in consideration thereof assumed and promised to the *Plaintiff* to pay the same sum of ten pound at an other day to come: And it was moved in arrest of Judge-

Judgement, that the consideration was too generall, and for that the action not maintainable, and all the Justices but *Foster* seemed the consideration was good, but *Foster* it seems was in some doubt of that, but Judgement was entred for the Plaintiff according to the verdict: And *Coke* cheife Justice said, that such a like action was maintained against *Kercher* his Chaplain, as Executor of his Father, and it seems for good Law.

## Legates Case.

ONE *Legate* was committed to *Newgate* Prison for Arrianisme for denying of the Trinity, by the high Commissioners: and it was moved on the behalfe of *Legate* to have a *habeas Corpus* and it was granted, and it was said by *Coke* cheife Justice, that the Statute of 5. H. 4. Chapter 10. Inhibits Justices of peace to commit any man to any private Prison. And it seemes if any do against this Statute, that an action of false Imprisonment lies: For every one ought to be committed to the Common Goale, to the intent that he may be delivered at the next Goale delivery, and also if any be committed to any of the Counters in *London*, unless that it be for debt, that an action of false Imprisonment lieth for that, for these are private Prisons, for the Sheriffes of *London* for Debt only.

Note in Debt for ten pound the Defendant confesseth five pound, and for the other five pound pleades that he oweth nothing by the Law, and at the day the Plaintiff would have been nonsuited. And it was agreed by all, that if he be nonsuited, that he shall loose all, as well the debt confessed as the other.

Note the yeare of the Reigne of the King was mistaken in the Record of *nisi prius*, but the Record which remains in the Court was very well, and it was amended: For inso much that it was a sufficient and certaine Issue, this was sufficient Authority to the Justices of *nisi prius* to proceed, but nothing being mistaken but the yeare of the Reigne, this shall be amended, for it is only the misprision of the Clark, see *Dyer* 260. 24, 25. 9. *Elix.* 11. H. 6.

Note also if Tenant in Dower be disseised, and the Disseisor makes a Feoffment, the Tenant in dower shall recover a ltheir dammages against the Feoffee, for she is not within the Statute of *Glocester* chapter 1. By which every one shall answer for their time.



Hillary 8. Jacobi 1611. in the Common Bench.

Reyner against Poell; See Hillary 6. Jacobi fol:

IN second deliverance for copy-hold in *Brampton*, in the County of *Huntington*; the case was, copy-hold Lands were surrendered to the use of a woman, and the Heires of her Body, and she took a Husband, the Husband and the Wife have Issue 2. Sonnes, and after Surrenders to themselves for their lives, the remainder to the eldest Son and his Wife in fee, the Husband and the Wife dye, the eldest Son dies, the youngest Son enters, and Surrenders to the use of a stranger: And the sole question upon which they relied, if the Wife was Tenant in tayl, or if she had fee simple conditionall; and it was argued by *Nicholls*; that the Wife was Tenant in tayl, and to prove that, he cited 2. cases in *Littleton*, where it is expressly mentioned, who may be Tenant in tayl, see Sect. 73. 79. And who may have a *Formedon*, fee in the descender, sect. 76. And he grounded that upon reason, for that, that it cannot be denied: But that fee simple might be of copy-hold according to the custome, and as well as fee simple, as well it may be an estate tayl, For every greater contains his lesse, and he said that this is grounded upon the reason of other cases, as if the King grant to one to hold Plea in his Court of all actions of debt, and other actions, and then one action of debt is given in case where it lieth not at the common Law, yet the Grantee may hold Plea of that: But if a new action be framed, which was not in experience at the time of the grant, but is given after by Statute, the grant shall not extend to that; and to the Objection, that copy-hold is no Tenement within the Statute, of gifts, &c. As to that he saith, that that shall be very well intended to be within the Statute as it is used, and 4. H. 7. 10. A man makes a gift in tayl by deed, the Donee hath an estate tayl in the deed as well as in the Land, so *Morgan* and *Maxells* case, Commentaries 26. And so of Office, Honour, Dignity, and copy-hold also; and *Dyer* 2 and 3. *Phil*: And *Mary* 114. 61. It is found by speciall verdict, that copy-hold Lands have been devisable by copy in tayl, and so it is pleaded 2 and 3 *Eliz.* *Dyer* 192. b. And when a lesser estate is extracted out of a greater, that shall be directed and ordered, according to the course of the Common Law; and for that the Wife shall have plaint in nature of a *Cui in vita*, and 15. H. 8. b. Title *Tenement* by copy of Court Roll, it was said for Law that tayl may be of a copy-hold, and that *Formedon* may well ly of that in descender, by protestation to sue in nature of a *Formedon* in descender at the Common Law, and good by all the Justices;



Justices; for though that *Formedon* in descender was not given but by Statute: Yet now this Writ lieth at the Common Law, and shall be intended that this hath been a custome, time out of mind, &c. And the Demandant shall recover by advise of all the Justices, and the like matter in *Essex M. 28. H. 8.* And *Fitz.* affirms, that in the chamber of the Dutchy of *Lancaster* afterwards; and also he saith, that when custome hath created such Inheritances, and that the Land shall be descendable, then the Law shall direct the discent, according to the Maximes and Rules of the Common Law, as incident to every estate descendable, and for that shall be *possessio Fratris*, of a copy-hold estate, 4. *Coke 22. a. Brownes Case. b.* And there 28. *a. Graueuer and Tedd*, the custome of the Mannor of *Allesley* in the County of *Warwick* was; that copy-hold lands might be granted to any one in fee simple: and it was adjudged that a grant to one and the Heires of his Body, is within the Custome, for be that Estate Tayl, or Fee simple conditionall, that is within the Custome: So he may grant for life or for yeares by the same Custome, for Estate in Fee simple includes all, and it is a *Maxime* in Law, to him that may do the greater, it cannot be but the lesse is lawfull; and over he said, that in all cases where a man was put to his reall action at the Common Law, in all these cases a copy-holder may have plaint with protestation to prosecute in nature of the same action; and to the objection, that there cannot be an Estate tayl of copy-hold Land, for that, that the Tenant in tayl shall hold of him in reversion, and shall not be Tenant to the Lord, to that he said that this Estate may be created as well by (*Cepit extra manus Domini.*) as by Surrender; and then there is not any reversion or remainder, but it is as if Rent be newly granted in tayl; but he said there may be a reversion upon an Estate tayl, as well as upon an Estate for life, and he did not insist upon the Custome, but upon this ground, that if the Custome warrant the greater Estate, which is the Fee simple, the lesse shall be included in that. And he did not argue, but intended that it would be admitted, that discent of copy-hold Land shall not take away entry nor Surrender of that, nor shall make discontinuance, so prayed Judgement and steturne. *Harris* the youngest Serjeant argued for the Plaintiff, that it shall be a Fee simple conditionall, and not an Estate tayl, and he said, that the sole question was if the Statute of *Westminster 2.* converted and changed Fee simple conditionall of copy-hold into an Estate tayl, for if it be not an Estate tayl within this Statute, it shall not be an Estate tayl at all, for *Littleton* saith, before the making of the said Statute, these Estates were Fee simple conditionall, and for that cannot be by prescription; also he said that copy-hold Estate

was so base an Estate, that at the Common Law a copy holder had no remedy but only in the Court of the Lord: But as to *Littleton* who sayth, that he may have a *Formedon* in discender, to that he saith, that the Heire which hath Fee simple conditionall may have it by the Common Law; for this was at the Common Law before the making of that Statute of *Westminster 2.* As it appears by 4. *Ed. 2. Formedon* 50. 10. *Ed. 2. Formedon* 55. And by *Bendlowes* in the Lord *Barkleys* case, in the Commentaries 239. b. by *Benlose* where it is said by him, that a *Formedon* in discender was not at the Common Law, but in a speciall case; where an Assise of *Mortdancester* would not serve the Issue; that is, if a man had Issue a Sonn, and his Wife died, and after that he takes another Wife, and Land was given to him and to his second Wife, and to the Heires of their two Bodyes begotten, and they have another Sonn, and the Wife dies, and after the Father dies, and a stranger abates, there he sayth that before the Statute, the youngest Sonn could not have an Assise of *Mortdancester*, and for that he shall have a *Formedon* in discender, which was no other but a writ founded upon his Case, see 10 of *Ed. 2. Formedon* 55. And for that when *Littleton* speakes of an Estate tayl of copy-hold, that ought to be understood of Fee taile, which may be Fee simple conditionally, and so *Littleton* may be reconciled, and will well agree with himself; also it seems that Copy-hold is out of the intent and meaning of the Statute of *Westminster 2.* For at the common Law in ancient times, this was base Estate, and not more in reputation then villinage, and also if such an Estate then might be created of that which shall be perpetuall and no means to barr it, for surrender of that doth not make any discontinuance, and Recovery was not known, till 12. *Ed. 4.* and he saith, that in ancient time the name of Copy-holder was not well known, for in ancient time they were called Tenants in Villinage, and Tenants by copy is but a new terme, (see *Fitzherberts Natura Brevium* 12. b. and the old Tenures fol. 20 and *Bratton libi 2. charter* 8. In gifts made to servants calleth them Villaines and Sokemen, and in the old Tenures it is said that the Lords may expell them, and upon this he inferred, that if it be so base a Feeure, though it be of Lands and Tenements, yet they shall not be intended to be within the intent of the makers of the Statute of *Westminster 2.* and also by a second reason, that is, that it was not the intent of the makers of the Statute that this should extend to any Lands but only to those which are free Lands, for the parties are called Donees and Feoffees, and the will of the Giver should be observed according to the forme in the Charter of his gift manifestly expressed, by which it appears that it ought to be of such Land of which a gift may be made, and also the Statute provides

provides that if the Donee levy a fine (that in right it should be nothing) by which also it appears as to him it seemed, that it ought to be of such Land, of which a fine may be levied. And also for a third reason, which was the great Inconvenience, which would ensue upon it, for then the Donees have no meanes to dispose of that, nor give that for the advancement of his Wife nor her Issues, and also the Lord shall loose his signiory, for the Donee shall hold of him in Reversion and not of the Lord, and it is resolved in *Heydens Case*, 3 *Coke* 8. a. That when an act of Parliament, alters the service, Tenure, Interest of the Land, or other thing in prejudice of the Lord or of the custome of the Mannor, or in prejudice of the *Tenant*, there the generall words of such act shall not extend to Copy-holders, see the opinion of *Manwood* cheife Baron there, and he agreed, that admitting it shall be an Estate taile, that then Surrender shall not make discontinuance, and so he concluded and prayed Judgment for the Plaintiffe his Clyent, see *Hill* and *Upchars Case*, which was adjudged in the Kings Bench, and the principall case was adjourned untill the first *Saturday* of the next Tearme, See *Hillari* 7. *Jacobi* in this Book in *Replevin* the Plaintiff was non-suited between the same parties. See also *Pasche* 9. *Jacobi* 149.

Hillary 1610. 8. *Jacobi* in the *Common Bench*.

*Wallop against the Bishop of Exeter and Murray Clark.*

**I**N a *Quare impedit*, the case was, Doctor *Playford* being Chaplaine of the King, accepted a Benefice of presentation of a common person; and after he accepted another of presentation of the King, without any dispensation, both being above the value of eight pound *per annum*, if the first Benefice was void by the Statute of 21 *H.* 8. chapter 13. or not, was the question, for if that were void by the acceptance of the second Benefice without dispensation, then this remains a long time void, so that the King was intituled to present by Laps, and presented the Plaintiff, the Statute of 21 *H.* 8. provides, that he which is Chaplain to an Earle, Bishop, &c. may purchase license or dispensation to receive, have, and keep, two Benefices with cure, provided that it shall be lawfull to the Kings Chaplaines to whom it shall please the King to give any benefices or promotions spirituall, to what number soever it be, to accept and receive the same without incurring the danger, penalty, and forfeiture, in this Statute comprised, upon which the question was, if by this last Proviso, Chaplaine of the King having a Benefice with cure above the value of eight pound *per annum*, of the presentation of a common person, might accept another Benefice with cure over the value of eight.

eight pound also of the presentation of the King without dispensation, the words of the Statute, by which the first Church is made void are, and be it enacted that if any parson or parsons having one Benefice with cure of Soules, being of the yearly value of eight pound or above, accept and take any other with cure of Soules, and be instituted and inducted in possession of the same, that then and immediately after such possession had thereof, the first Benefice shall be adjudged in the law to be void. See *Hollands case 4. Cooke 75. a.* This case was not argued but the point only opened by *Dodridge* Serjeant of the King for the Plaintiff, and day given for the argument of that till the next term.

Hillary 8. Jacobi 1610. in the Common Bench.

Tresham against Lambe.

**L**ewes Tresham was Plaintiff in waste against John Lambe, the Plaintiff supposed the Defendant had made waste in sowing and plowing ancient meadow, the which he had let to the Defendant for years in *Rushton* in the county of *Northampton*, and sowed it with Woade, and prayed Estrepement upon the Statute of *Glocester*, chapter 13. And upon examination it appears, that the Lands let was pasture and Meadow, the Pasture was Ridge and furrow, but had been mowed and used for meadow for diverse years, and that the Defendant plowed and sowed that with Woade, but this which had been ancient meadow, he used that as Meadow, and did not convert that to Arable Land, but the Judges would not grant any Estrepement to the Pasture, for that it was Ridge and furrow, and it was no ancient meadow, although that had been mowed time out of minde, &c. But to the ancient Meadow they granted a writ of Estrepement, but *Foster* seemed to be of another opinion, for that, that it was to sow Woade, for that that it is against common Right, and the fume and smell of that is offensive and infectious, but if it had been to sow Corne he agreed as above, and for the executing the Writ of Estrepement, they all agreed that the Sheriff ought to take, if need be, the power of the County against those which made the waste (hanging the Action) and may commit them if they will not obey him, for the words of the Statute are, that you shall cause to keep, which shall be intended in safety. But if Lessee for years trench or draine, that is no Waste, as it was now of late times adjudged, where if the Lessee takes any of the reasonable Bootes that the Law allowes, that it shall be no Waste nor Estrepement.



ment shall be granted, see *Fitzherberts Natura Brevium*, 59. m.

If a man devise Land to his Executors for years, this is assets, but if he devise that his Executors shall sell his Lands, or devise his Lands to his Executors to be sold, this shall be no assets untill the Lands are sold, and the money for which the land shall be sold, shall be assets.

A Record of *Nisi prius*, in an Action of Debt upon an obligation, with condition to pay such a sum of Money at such a Feast next after the date of the obligation, and the day of the date of the obligation was omitted in the Record of the *Nisi prius*, so that it doth not appear which shall be the next Feast at which the money ought to be paid after the date, and by all the Justices, that was no perfect Issue, and for that the Justices of *Nisi prius* have no power to proceed upon it, and for that it shall not be amended, otherwise if it had been a good Issue, though that another thing had been mistaken, see *Dyer* 9. *Eliz.* 260. 24. And see before the same Term here.

The King pardoned a man attain, for giving a false verdict, yet he shall not be at another time impannelled upon any Jury, for though that the punishment were pardoned yet the Guilt remains.

Hilary 8. Jacobi 1610. In the Common Bench.

James versus Reade.

THE case was, the King was seised of a Mannor, where there were diverse Copy-holders for life, and was also seised of eight Acres of Land in another Mannor, in which the Copy-holders have used time out of minde, &c. To have common, and after the King grants the Mannor to one, and the eight Acres to another, and a Copy-holder puts in his beasts into the eight Acres of Land, and in trespass brought against him by the Patentee of the eight Acres, he prescribes that the Lord of a Mannor, and all those whose estate he hath in the Mannor have used time out of minde, &c. For themselves and their Copy-holders to have Common in the said eight Acres of Land; and further pleaded that he was Copy-holder for his life by grant, after the said unity of possession in the King, and so demanded judgment if action, against which the said unity of possession was pleaded, upon which the *Defendant* demurs, and all the Justices seemed that though that prescription was pleaded that the common was extinct, but it seems also to them that by speciall



ciall pleading he might have beene helped and save his common, for this was common Appendant, see 4. *Coke*, *Tirringhams Case*, 37. 6.

Hillary 8. Jacobi 1610. *In the Common Bench.*

*Cartwright against Gilbert.*

**I**N Debt upon an obligation with condition to be and perform an Arbitrement to be made, the Arbitrators award, that the Defendant should make Submission, and should acknowledge himself forry for all transgressions and words, at or before the next Court to be held in the Mannor of *P.* And for the not performance of that Award, the Plaintiff brought this Suit, and the Defendant in Barr of this, pleads that at the said next Court, he went to the Court to make his submission and to acknowledge himself greived according to the Award, and was there ready to have performed it, but further he saith, that the Plaintiff was not there to accept it, upon which the Plaintiff demurred; and it seemes to *Coke and Foster* that the Defendant hath done as much as was to be done of his part; and for that, that the Plaintiff was not there ready to accept, the Defendant was discharged, for this submission is personall, and to the intent to make them freinds, and for that both the parties ought to be present. But *Walmesley and Warburton* seemed, that it might have been very well made in the absence of the Plaintiff, as well as a man may submit himself to an Arbitrement of a man which is absent, for this is only to be made to the intent to shew himself sorrowfull for the Trespasses and words, which he hath made and spoken, and it was not argued but adjourned till the next tearme, and the Justices moved the parties to make an end of that, for that it was a trifling Suit.

Hillary 8. Jacobi 1610 *In the Common Bench.*

*Sir Edward Ashfeild.*

**S**IR *Edward Ashfeild* was bound in an obligation by the name of *Sir Edmund*, and subscribed that with the name of *Edward*, and in Debt brought upon that, he pleads ( it is not his Deed ) and it seemes to all the Justices that he might well plead that, for it appears to them that he is not named *Edmund*, and the originall against him, was, Command *Edward*, otherwise *Edmund*, and this was not good, for a man cannot have two Christian names, and if judgment were given against him by the name of *Edmund*, and the Sheriff arrest him by

by *Capias*, that false imprisonment lies against him. But if he have a name given to him, when he was christened; and another when he was confirmed, he shall be called and known by the name given unto him at the time of his confirmation, and not by the first, (see, 11. R. 2. Grants 9. Ed. 3. 4. 12. R. 2. Proffments 58. See: *Perkins fol. 8. b. 9. a. Grants, 10. Eliz. Dyer, 279. 4.*)

Hillari 8. Jacobi 1610. In the Common Bench.

Styles against Baxter.

Styles brought an Action upon the case against Baxter for calling him perjured man; the Defendant justified that he was perjured in such a Court, in such a deposition, and so pleaded that certainly, and it was found for the Defendant at the *Nisi prius*, and Judgment was given accordingly, and the Defendant afterwards published the same words of the Plaintiff, upon which he brought a new Action for the new publication, in which the Defendant pleaded in Barr the first Judgment, upon which the Plaintiff demurred, and it was adjudged without any Contradiction; that it was a good Barr.

Hillari 8. Jacobi 1610. In the common Bench.

Andrews against Ledsam in the Star Chamber.

Andrew exhibited his bill in the Star Chamber against Ledsam, in the matter, Andrew being a rich Usurer, delivered to Ledsam being a Scrivener, one thousand pound, to be imployed for him for Interest, that is, for ten pound for the use of every hundred pound for every year, Ledsam being a Prodigall man, as it seemes, spent the Money, and delivered to Andrews diverse severall obligations, every of them containing three severall persons, well known to be sufficient, being some of them Knights, others Gentlemen, and Esquires of great Estates, and the other good Citizens without exceptions, were bound to Andrews in two hundred pound for the payment of one hundred sixty pound to Andrew at a day to come within six Moneths then next comming, as Andrew had used before to lend his Money, and delivered the Obligations with Seales unto them, and the names of the parties mentioned to be bound by that subscribed, and his own name also subscribed as witnessing the sealing and delivery of them, as a publique Notary, for the good and lawfull obligations of the Parties which were mentioned in them, where indeed the parties mentioned in them, had

not any notice of any of them. But *Lodsam* had forged and counterfeited them, as he hath confessed upon his Examination, upon Interrogatories administred by the Plaintiff in this Court, and at the hearing of the Cause and sentence of that, it was moved if *Lodsam* shal loose both his Eares or but one, for if it be but one forgery, then by the Statute of 5. *Eliz.* Admitting that the Bill is grounded upon this Statute, he shall loose an Eare and pay the double dammages and cost to the party greived: And also if *Andrew*, being but the Obligee, and not any of the parties, in whose names the Obligations were forged, if he be such a party greived, which shall have double costs and dammages, and these doubts were resolved by *Coke* cheife Justice of the Common Bench, where they were moved, and *Flemming* cheif Justice of the Kings Bench, that *Lodsam* should loose but one eare, for that shall be taken as one forgery, for that it was made at one time, and also that *Andrew* was the party greived within the Statute, but *Coke* said that the Bill was generall, that is against the Lawes and Statutes of the Realme, and not precisely upon the Statute of 5. *Eliz.* For he said, that when a Bill is founded upon an Act of Parliament, that this ought to containe all the branches which are mentioned in the Act, the which wants in this Bill, but in somuch, that it was adjudged in Parliament what punishment such offenders shall have, they inflicted the same punishment which is appointed by the Statute, and added to that, that he should be Imprisoned till he found good Suerties for his good behaviour, and also that hee shall be brought to every one of the Kings Courts at *Westminster* with great Papers in his hatt, containing his offence in Capitall letters, but the Lord Chancellor expounded the double dammages in such manner; that is, that they shall not be intended double Interest, but only the Principall Debt.

Note, that if Execution be directed to a Sheriffe, to Arrest any man, orto make Execution within a Liberty: And the Sheriffe direct his Warrant to a Bayliffe of the Liberty, for to make Execution of the Proceffe, which makes it, and after is a Fugitive, and not able to answer for that, the Lord of the Franchise shall answer for that, and shall be liable to answer for his Bayliffe, by all the Justices.

### Burdett against Pix.

IN Debt upon a single Bill by *Burdett* against *John Pix*, as administrator of *Freemen*, the case was this; that is, *Freemen* was bound in an Obligation of thirty four pound to *Burdett* the Plaintiff,

tiff, and was also bound to one *William Pix* in 80. l. *Freemen* dyed Intestate, and the Letters of Administration of his Goods were Committed after his Death, to the said *John Pix*, the Defendant and the said *William Pix* also made the said *John Pix* the Defendant his Executor and died, and the Defendant in this Action pleads, that the said *Freemen* was indebted to the said *William Pix*, and that he was his Executor, and that he had Goods of the said *Freemen*, sufficient to satisfy the said debt, the which he retained for the satisfaction of that, and that over that, he hath not of his to satisfy him, upon which the Plaintiff Demurs for that, that the Defendant doth not plead, that he hath made his election to retain the said goods, for the satisfaction of his own said Debt before the Action brought, and by all the Justices, he ought to make his election before the bringing of the Action, otherwise he shall be charged with the other Debt. See *Woodward and Darcyes Case*, Commentaries 184. a. and 4. *Cook* 30. *Conltrys Case*.

*Hillary* 8. *Jacobi* 1610. in the *Common Bench*.

*Bone against Stretton.*

THE case was this, A man seised of two Acres of Land, makes a Lease for years of one Acre to one, and another Lease for yeares of the other Acre to another, and then he enters and makes a Feoffment, and severall Liveryes upon the severall Acres, and one of the Lessees being present, doth not assent to the said Livery, and the use of the said Feoffment, was not the use of his last Will, and then he declares his last Will, and by that recites the said Feoffment, and then declares the use of that to be to the use of himself for life, the remainder over to a stranger, and after the Tenant for years which did not assent to the Livery, grants his Estate to the Feoffor, and the Feoffor dies; and *Nicholls* Serjeant moved first: That this enures as a grant of a reversion; and that the grant of the perticuler Tenant enures, first as an Attornment, and then as a surrender of his Estate, as if it had been an expresse surrender, and all the Justices agreed, that this doth not enure to make Attornment and surrender as expresse surrender will, for an expresse surrender admits the reversion, to be in the Grantee to whom the surrender is made: But in this case before Attornment the Grantee hath nothing, and after Attornment the particuler Estate being granted, it shall be drowned in the reversion, *Harris* Serjeant, the words of the devise are, that his Feoffees and all other



Persons which after his Death shall be seised, shall be seised to the same uses before declared, and of one Acre he hath not any Feoffees, for of that the Feoffment was voyd, and yet it was agreed that the devise was good, as *Lyngies Case* was in 35. H. 8, cited by *Anderson*, in *Welden* and *Elkinsons Case*, *Commentaries* 523 b. And he argued, that though, that when a conveyance may enure in severall courses, yet it cannot enure for part in one course, and part in another course, and for that this devise enures as a devise of Land for one Acre, and declaration of the use of the Feoffment for another Acre, for it is agreed in *Sir Rowland Haywards Case*, 2. 3. 4. 5. 6. *Coke* 18. a. *Sir Edward Cleeves Case*, and also in this case the devilor hath made expresse declaration, that the Land shall passe by the Feoffment, and that the Will shall be but a declaration of the use of the Feoffment, and for that nothing shall passe by the devise, with which the Justices seemed to accord, and cited a case to be adjudged in the Kings Bench, 40. *Eliz.* where the Father gives and grants Lands to his Son & his heires with warranty, and makes a Letter of Attorney within the deed to make Livery, and adjudged, that that shall not enure as a Covenant to raise a use, for that, that it appears by the Letter of Attorney, that his intent was, that that should enure as a Feoffment, and not as any other manner of conveyance, see 14. *Eliz.* *Dyer* 311. 83. *Master Cromwells Case*, and so it was adjudged accordingly.

Hilary 8. Jacobi 1610. in the Common Bench:

Gargrave against Gargrave.

Replevin.

**K**atherine Gargrave, was Plaintiff in a *Replevin* against Sir Richard Gargrave Knight, and the case was this, The Father of Sir Richard Gargrave was seised of divers Tenements called *Lynghall Hall* in *Lynghall*, and of a Moore called *Kingsley* Moore in another Town, and the Tenants of the said Father of Sir Richard have used to have Common in the said Moore, and the said Father so being of that seised, demised the said Tenements to the said Katherine Gargrave for her Joynture, by these words, by the name of *Hinsell Hall*, and certaine Land Meadow, and Pasture in certainty, and with all Lands, Tenements, and Hereditaments to that belonging, or with that occupied and enjoyed, how or late in the Tenure of one *Nevill*, and *Nevill* was Tenant of the said premises, and had Common in *Kingsley* Moore, upon which the question was, if the said Katherine by this demise shall have Common



Common in the said Moore or not. And *Hutton* Serjeant argued, that the said *Katherine* shall have Common in the said Moore, for he said, that the said demise shall be expounded, according to the intent of the parties, as it is agreed in *Hill and Granges Case*, Commentaries 270. b. Where a man makes a Lease for yeares of a house, and all the Lands to that belonging, and though it is there agreed, that Land cannot be appurtenant to a house, yet this word appurtenant, shall be taken in the effect and sense of usually occupied with the Messuage or lying to the house, by which it appears that the words are transferred from the proper signification to another, to satisfy the intent of the parties, for it is the office of the Judges, to take and expound the words which the common People use, to expresse their intent according to their intent, and for that shall be taken not according to the very definition, insomuch that it doth not stand with the matter, but in such manner as the party used them: And for that this grant shall amount to a new grant of Common in the said Moor, for as it seems common or feeding, for Cattell may be granted, and passe by the name of Tenements & Hereditaments, or at least shall be included and comprised within the words Tenements and Hereditaments, and so shall be construed as a thing occupied and enjoyed with the said Messuages, see *Hen. Finches Case* 39. *Coke*. And it was an expresse endowment upon the demise, that the said *Katherine* should not have Common in the said Moore, but it was agreed by all, that this was vaine and idle, and nothing worth, but he urged that this shall have a favorable construction, for that it was for Joynture, which shall have as favorable construction as Dower. And so he prayed Judgement for the Plaintiff; and of the other part *Nicholls* Serjeant argued, that this shall not amount to a new grant, for he said that they are not apt words to receive such construction, for he said that this is no Tenement or Hereditament, no Common, but only a Feeding for the Cattell of the Lessee, in the wast of the Lessor, see 20. *Edm. 2. Fitzherbert* admeasurement, and it cannot passe as a thing used with the said house, for that was not in Effect at the time of the grant, and there is not any apt word to make a new grant, and so he prayed Judgement in Action of wast, between *Arden* and *Darcy*, where *Arden* was seised of the Mannor of *Curball* and also of *Parkhall*, and makes a conveyance of the Mannor of *Curball* to divers uses, and at this time parcell of the Mannor of *Curball* was occupied with *Parkhall* as parcell of that, and after made another conveyance of all his Lands in *England*, except the Mannor of *Curball*; And adjudged that the *Parke*, which is used with *Parkhall* shall not be within the exception, *Coke* saith, that it was only feeding, and not Hereditament, for the

the Inheritance of both was in the Lessor ; but if it be granted of feeding it shall be intended the same like feeding, that the Tenant hath ; as if the King grant such Liberties as the City of London hath, and that shall be good, and so it was adjourned.

Hillary 8. Jacobi, 1610. *In the Common Bench.*

*Cannige against Doctor Newman.*

**I**N an Information upon the *Statute* of 21 H. 8. chapter 13. Of non-residency, it was found by speciall Verdict, that Doctor Newman was Incumbent, invested in the Rectory of *Staplehurst* in the County of *Kent*, and that hee was also seised of a house in *Staplehurst* aforesaid ; situate within twenty yards of the said Rectory, and that the mansion house of the said Rectory was in good repaire, and that Doctor Newman held that in his hands and occupation with his one proper goods, and did not let it to any other, and that he inhabited in the said Messuage and not in the Parsonage, the Statute of 21 H. 8. chapter 13. Provides, that every Parson promoted to any Parsonage, shall be personally resident, and abiding in, at, and upon his said Benefice, and in case any such spirituall Parson keep not residence at his Benefice, as aforesaid, but absent himself willfully by the space of a month together or two Moneths, to be accounted at severall times, in any one year, and makes his residence and abiding in any other places by such time, that then he shall forfeit for every such default ten pounds, the one halfe to the King, and the other halfe to the Informer ; and if the said Doctor Newman was not resident, and incurred the penalty of this Statute was the question, and it was argued by *Haughton*, that he had incurred the penalty of the Statute, and was non-resident within the intent, and he argued that to some intent all the Parish may be said the Benefice of the Parson, for that, that he hath benefit out of it, and he is called Parson of such a Town or Parish, but this is not the Benefice that the Statute intends, upon which he ought to be resident, as in the 29. Assise 55. If a Corrody be granted out of an Abby, it shall not be intended out of the seat of the Abby, out of the Booke of 29. Assise 8. Where it is said, that if a Rent be granted out of a Priory, that all the possessions of the Priory are charged, as to that he saith, it was but (it was said) and not Judgment, and also the said Bookes may be well reconciled, for it is more proper that the seate of the Abby shall be charged with the Corrody, and the possessions of the Priory with the Rent, and also he said, there were seven causes of making of the said Statute, whereof but two are to our purpose, the first is Hospitality, second releife

releife of the Poore, and these are to be done in the Parsonage house, for this is the free Almes of the Church, and so it was adjudged, 34 of *Eliz.* in the Kings Bench, *Broome and Hudson*, and in this Court also, and in this Court also in the 40 of *Eliz.* in the Kings Bench betwixt *Butler and Goodall* 6 *Coke* 21 *b.* that he ought to be resident upon the Parsonage house and not other where, and he allowed and agreed, that imprisonment without deceit, and sicknesse are good excuses, but so it shall not be a prejudice, for the Parsonage house is in good repaire: And so concluded that judgment shall be given for the Plaintiff: And for the *Defendants*, *Barker* Serjeant argued, that it appears by the speciall Verdict, that Doctor *Newman* held the Parsonage house in his own hands and occupation, and did not let it, upon which he gathered that his servants were resident upon it, and to the exposition of the *Statute*, he saith, that it appears by *Heydons Case*, 3 *Coke* 7. *a.* That the better means to expound *Statutes*, is to consider the mischeife which was at the common Law before the making of that, and when it is intended to be reformed by that, and this appears by the Preamble of that *Statute*, also he saith, that before the Council of *Lateran* a man might pay his tithes to whom he would, but by the same Council all the Parish is made the Benefice of the Parson, for he receives benefit by that, and yet he said, that before the said *Statute*, every spirituall man was bound and compellable by the Ecclesiasticall Law to be resident, yet if he were in the Kings Service or an Officer in the *Chancery*, he should be excused, as it appears in the Register, fol. 58. *b.* Though that he were Dean, the which Office meerly requires his personall residence, as it is there said, and also he saith, that the Case between *Butler and Goodall*, was that the Parson demised all the Parsonage house but only one Chamber, and was not resident in that, but in a Copy-hold within the Town, and so prayed Judgment for the Defendant, this case was compounded by the Lord *Coke*, but he intended this was no residence within the *Statute*, for this was not his Benefice, but the Tenants part of that, as he said hath been adjudged in the Exchequer.

Hillary 8. Jacobi 1610 In Banco Communi.

Crogat against Morris

THE Case was, A Commoner brought an Action upon the Case, against a stranger, for that his Beasts came in and fed upon the Common, and by *Coke*, *Walmesley*, and *Warburton* it lieth very well, *Foster* to the contrary, for then every Commoner may have the same Action, and then it would be infinite.

*Pyat*

the new Hilary 8. Jacobus 1610. In Banco Communis.  
Plat against the Lady Saint John, Postea, 269.

**S** E E For the beginning of this in Michalemas tearme last, and that  
Sale was argued again by *Hutton* Serjeant for the Defendant, that  
the parcelling of reversion destroyed the Covenant, it was agreed  
in *Winters* case in case of condition, and he agreed, that that Covenant  
is within the Statute of 31. H. 8. chapter. 34. as well as condition,  
and for that Grantee of part of the Reversion shall not have an Action  
of Covenant, for then if there be twenty Grantees, every one  
of them shall have severall Action, and this was not the intent of  
the Statute, and as to the Common Law before the Statute, a  
thing which gives action cannot be divided, and he urged, that  
when the Reversion of Fee simple was first granted, if he may by  
that have an action, then when the Reversion of the tearm was granted  
he may have another action, and so a man may have two se-  
verall actions for one thing, see. 29. *Affise* 23. Three Coparce-  
ners were, and Rent of five pound was allotted to two of them  
equally to be divided, that is, fifty shillings to one and fifty shil-  
lings to another, and they two joyned in an Action, and it is doub-  
ted if the Writ shall abate or not, and 44. *Ed.* 3. 34. b. The Abbot of  
*Westminster* Case, the Abbot made a Lease of a Mannor, except  
the Wood, and after by another Deed he let the Wood, and  
the Lessee made Wast in the Mannor and the Wood, and he brought  
one Action of Wast and it is not good, and he agreed that one *For-*  
*medon* yerth upon two discontinuances, for there was but one dis-  
continuance, and that is the cause of the Action, but a man cannot  
have a Writ of *Warrantia Charite* upon two Deeds, no more in the  
principall case, for the Plaintiff hath his Title by two Deeds, and so  
concluded, and prayed Judgment for the Defendant. *Harris* Serjeant  
argued of the other part for the Plaintiff, that an action of Cove-  
nant lieth very well, for the originall Lease was but one intire Lease,  
and the Covenant was also intire, and for that the Grantee of the  
Reversion shall have advantage of that, and he agreed that in reall  
actions, which alwaies are grounded upon the title, and for that if it  
be grounded upon two titles, he ought to have 2. actions according to  
his title, but in personall actions where the action is grounded upon  
the deed, & another matter which comes (*Ex post facto*) which is the  
(wrong) which is the cause of the action, & for which damages shall  
be recovered, as it is said in *Blake* Case, 44. n. 6. *Coke*, and this is the  
reason that a man may have an Action upon the Statute of Offen-  
ders in Parkes for hunting in two Parkes, 13. H. 7. r2. and 8. *Ed.* 4. 39.  
One Action of Trespasse for Trespasses made at severall times, and



so one Action of Debt for diverse Contracts: 11 H. 6. 24. by *Martin*, 3 H. 6. *Tresspass*, 3 H. 4. But he argued that in reall or mixt Actions, as ravishment of Ward, for severall Wards or one; *Quare impedit* for severall Churches, this shall not be good, *Fitz. Ward* 52. 3. H. 6. 52. And also he said that the Statute of 32 H. 8. chapter 34. by expresse words gives the same remedy to Grantees of Reversions, that the Grantors themselves had, and the Grantor without question, may have an Action if he have not granted the Reversion, and so he concluded, and prayed Judgment for the Plaintiff, and it was adjourned.

Hillary 8. Jacobi 1610. In the Common Bench.

*Sturgis against Dean*, see T. 65.

A Man was bound to pay to the Plaintiff ten pound within ten dayes after his return from *Jerusalem*, the Plaintiff proving that he had been there; and the Plaintiff after ten dayes brought his Action upon the Obligation, without making of any prooffe that he had been there, and if that were good, or that he ought to make prooffe of that before he brings his Action, this was the question, and also he ought to make prooffe, then what manner of prooffe, and it was moved by *Haughton*, that when a thing is true, and is not referred to any certain and particular manner of proof, as before what shall be done, or how the prooffe shall be made, the party may bring his Action, and the other party may take his Issue, upon the doing of the thing which ought to be proved & the triall of that shall be prooffe sufficient, and in his count he need not to aver that he had been there, see 10 Ed. 4. 11. b. c. 15, Ed. 4. 25. 7 R. 2. *Barr* 241. And here also the prooffe, if any should, it ought to be made within ten dayes, the which cannot be made by Jury in so short a time, as it is said by *Choke* in 10 Ed. 4. 11. b. though that he agreed, that when a man may speake of prooffe generally, that shall be intended prooffe, by Jury, for that, that this is the most high prooffe, as it is said in *Gregories Case*, 6 Coke 20. a. and 10 Ed. 4. 11. b. But of the other part it was said by *Sherley Serjeant*, that true it is that prooffe ought to be made for the Defendant, as the Case is in 10 Ed. 4. 11. That then such prooffe should be sufficient, for the Plaintiff may bring his Action before that the Defendant may by possibility bring his Action, but where the Plaintiff ought to make the prooffe, there he ought to prove, that before that he bring his Action, and it shall be accounted his Folly, that he would bring his action before he had proved that, but all the Justices agreed, that the Plaintiff need not to make any other



proofe, but only by the bringing of his Action, but the Lord Coke took exception to the pleading, for that, that the Plaintiff hath not averred in his replication that he was at *Hierusalem*, but generally that such a day he returned from thence; and he said, that a man might retorne from a place, when he was not at the same place, as if he had been neere the place, or in the skirts of *Hierusalem*, and upon that it was adjourned, see the beginning of that. *Trinity 8. Jacobi 462. n. Mich. 13. 206. and 204.*

*Hillary 8. Jacobi 1610. in the Common Bench.*

### Wickenden against Thomas.

2. Executors  
one refuses.

**T**He Case was this, 2. Executors were joyntly made in a Will, one of them releases a Debt due to the Testator, and after before the Ordinary refuses to Administer, and it was agreed by all the Justices; that the release was Administration, and for that he hath made his Election, and then the Refusal comes too late, and so is void.

### Bedell against Bedell.

Waste, 2. Executors, one refuses.

**I**n waste the case was this, A Man seised of Lands makes his Will, Land of that makes two Executors, and devises his Lands to his Executors for one and twenty yeares after his Death, upon trust, that they should permit *A.* To enjoy that during, and to take all the profits all the Terme, if he so long lived, and if he died within the Terme, then that *B.* should take the profits, and so with others remained in the same manner, with the remainder over to a stranger in tayl, one of the Executors refuseth to prove the Will, or Administer, and also to accept the Terme, the other executor proves the Will, & Administers the Goods, and enters into the Land according to the Lease, and that assigns to *A.* according to the trust reposed in him, and after that he in reversion in tayl brings an Action of waste against the Executors which proved the Will, and he proved all the matter aforesaid, and that before the assignement, and that before that no waste was made, and it seemes to all the Judges, that this was a good Plea, for the waving of one Executor is good, and though that he might after Administer, as the book of 21. *Ed. 4.* Is for that, the Interest of his Companion preserves his Authority, where are 2 or more. But if there be but one Executor and he refuseth, and the Ordinary grants Administration to another, he cannot then Administer againe; and Coke cheife Justice cited that one Rowles, made the Lord Chancellor

Chancellor which then was the choise Justice of England; and the Master of the Rolls, his Executors and died, and they writ their Letters to the Ordinary, witnessing that they were Employed in great businesses, and could not intend the performance of the said Will, and that for that, they desire to be free of that, and that the Ordinary would commit the Administration, of the goods of the said Testator to the next of blood, and this sufficient refusall. And upon that the Ordinary committed the Administration accordingly: And to the pleading, that no wast was made before the assignement, they all agreed that this was good, and so it was adjourned for this time.

A man sould his Land upon a condition, and after took a Wife and died, the Heire entred for the Condition broken; yet the Wife shall not be endowed, so if the Condition had been broken before the Death of the Husband, if he had not entred, for he had but title of entery.

*Bargaine and  
Sale upon  
Condi*

*Hillary 8. Jacobi 1610. in the Common Bench.*

*As yet Doctor Husseys Case:*

**M**oore against Doctor Hussey and his Wife and many others, in Ravishment of Ward. The case was, the Ward of Moore was placed at the University of Oxford to be instructed in the liberal Sciences, and was married by the Wife of Doctor Hussey to the Daughter of the said Wife, which she had by a former Husband. And for that Moore brought this Writ against Doctor Hussey and his Wife, and the Minister which married them, and all others which were present at the said marriage, or Actors in that. And upon Evidence it appeared, that Doctor Hussey was not present nor Actor in it; and for that the Jury found him not guilty, but they found all the other Defendants guilty of the said Ravishment, for upon the Evidence it appeares, that the Wife of Doctor Hussey procured and provided the Minister which married them, and in the last Michaelmas Terme this was tried here at the Barr, and the Jury assessed Dammages to ten pound, and the value of the Ward to eighty pound, for so much Moore proved that he could have sold him for, and also the Jury found, that the Ward doth appeare married being of the Age of 16. yeares at the time of his marriage, and exceptions were taken to that, for that it was not found of what age the Ward was at the time of the verdict, and it was urged by Dodridge that by the Statute of Westminster 2. chapt. 39. The precise age ought to be found at the time of the verdict. Secondly it was found that the Ward did appeare married,

*Ravishment of  
Ward.*

and doth not say without License of the Guardian, and the Guardian may give his consent, where the Ward marries himselfe, and then there is no cause of action. The third and other exception was taken in the behalfe of the Wife of *Dottor Hussey*, for that shee being a married Wife was found guilty of Ravishment of Ward, against the Statute of *Westminster* the 2. chap. 39. And it was urged that it was not the intent of the Statute that provides, that he which did Ravish, not having right in the marriage, though he should restore the Boy naked and not married, or should satisfie for the marriage, he shall be punished for the transgression, by Imprisonment for two yeares, and if he shall not restore him, or shall marry the Heire, after the marrying yeares, and cannot satisfie for the marriage, he shall abjure the Realme, or shall have perpetuall Imprisonment. And it was objected that a married woman, was not intended to be within this Statute, for it is apparent, that a married woman hath not wherewith to make satisfaction, and it shall not be intended that she shall have perpetuall Imprisonment, or make abjuration, for this was to make separation betweene the Husband and his Wife, and so it was adjourned. And the Judges moved the parties to compound amongst themselves, see *Michalmas* 8. *Jacobi*. Trinity 9.

*Jacobi* 9. *Pasch* 9. *Jacobi* 1611. in the Common Bench.

*Mich. 8. Jacobi. Rot. 213.*

### Kenricke against Pargiter and Phillipps.

*Common of Pasture.*

**R**obert Pargiter Gentleman, and John Phillipps, were summoned to answer to Robert Kenricke Gentleman of a Plea, why they took the Beasts of the said Robert Kenricke, and those unjustly detained against Suerties and Pledges, &c. And thereupon the said Robert Kenricke by Thomas Pilkington his Attorney doth complaine; that the said Robert and John the fourth day of August the yeare of the Reigne of our now King seventh, at Kings Sutton in a certaine place called Great Greenes took Beasts, that is to say, one Gelding, one Mare, and one Colt of the said Robert Kenricke, and do unjustly detaine them against Suerties and Pledges, untill &c. By which meanes he saith he is the worse, and hath losse to the value of twenty pound, and therefore bringeth this suit, &c. And the aforesaid Robert Pargiter and John Phillipps, by John Barton their Attorney, do come and defend the force and Injury when, &c. And the said Robert Pargiter in his own right doth well avow, and the aforesaid John Phillipps as Bailiff of the said Robert Pargiter, doth well acknowledge the taking

taking of the said Beasts in the aforesaid place in which, &c. and justly, &c. Because he saith that the said place, in which it is supposed the taking of the said Beasts to be made, did containe and at the aforesaid time in which it is supposed the taking of the aforesaid Beasts to be made, did containe in it foure Acres of Meadow in *Kings Sutton* aforesaid, which the said *Robert Pargiter* long before the aforesaid time in which, &c. and also at the same time in which, &c. was and as yet appeareth seised of one Messuage and one virge of land with the appurtenances in *Kings Sutton*, in his Demesne as of Fee, and that the aforesaid *Robert Kenrick* the aforesaid time when, &c. and long before was seised of a Messuage and foure Virges of land with the appurtenances in *Kings Sutton* aforesaid, whereof the aforesaid place in which, &c. Is, and at the aforesaid time when, &c. and also at the time, to the contrary doth not appeare in the memory of man, was parcell in his Demesne as of Fee. And the said *Robert Pargiter* and *John Phillips* further say, that the said *Robert Pargiter* and all those whose Estate the said *Robert Pargiter* now hath, and at the aforesaid time when, &c. had in the aforesaid Messuage and one Virge of Land with the Appurtenances of the said *Robert Pargiter*, from time the contrary whereof doth not appeare in the memory of man, had and have used to have, and were accustomed to have Common of Pasture in the aforesaid place, &c. For six Horses, Geldings or Mares, two Colts, six young Beasts called Steeres, or young Beasts called Heifers, and two Mares called breeders, in and upon the said Messuage, and one Virge of Land with the Appurtenances, lying and rising in manner and forme following, that is to say, every year, in and from the first day of August called *Lammis* day, untill the feast of the purification of the blessed *Mary* the Virgin, then next following, as to the said Messuage and one Virge of Land with the Appurtenances, belonging, and the said *Robert Pargiter* and *John Phillips* further say, that the aforesaid *Robert Kenrick* of the aforesaid Messuage and foure Virges of Land with the Appurtenances whereof, &c. In the forme aforesaid, appearing seised, the said *Robert* and all those whose Estate the said *Robert Kenrick* now hath, and at the aforesaid time in which, &c. had in the aforesaid Messuage and foure Virges of Land with the Appurtenances whereof, &c. time out of mind, had and were used and accustomed to have the aforesaid place in which, &c. To their proper use in severalty every year, in and from the feast of the purification of the blessed Virgin *Mary*, untill the first day of August called *Lammis* day, then next coming, that by reason, and in consideration thereof, he the aforesaid *Robert Kenrick*, and all those whose Estate the said *Robert Kenrick* now hath, and at the time in which,



which, &c. had in the aforesaid Messuage and foure Virges of Land with the Appurtenances whereof, &c. time out of minde, have had and were accustomed to have every yeare from the aforesaid first day of August, called *Lammas* day, and from thence untill the aforesaid purification, then next following, Common of pasture in the aforesaid place in which, &c. Only for three Mares or Geldings and no more, and because the Beasts aforesaid in the narration aforesaid, specified over and above the aforesaid other three Mares or Geldings, the aforesayd time in which, &c. were in the aforesayd place in which, &c. the Grasse then growing, there eating, and the Common of pasture of the sayd *Robert Pargiter*, overcharging, and doing damage to the sayd *Robert* there, the sayd *Robert Pargiter* in his owne right doth wel avow, and the aforesayd *John Phillips* as Bayliff of the aforesayd *Pargiter* doe well acknowledge the taking of the Beasts aforesayd in the aforesayd place in which, &c. and justly, &c. they then doing damage there, &c.

And the aforesayd *Robert Kenrick* saith, That neither the sayd *Robert Pargiter* for the reason before alleadged, the taking of the aforesayd Beasts in the aforesayd place in which, &c. can justly avow, nor the aforesayd *John Phillips* as Bayliff of the aforesayd *Pargiter*, for the same reason the taking of the Beasts aforesayd, in the aforesayd place in which, &c. justly can acknowledge, Because by protestation that he the sayd *Robert Kenrick*, and all those whose estate the sayd *Robert Kenrick* now hath, and at the aforesayd time of the taking, &c. had in the sayd Messuage and foure Virges of Land, with the appurtenances, whereof, &c. time out of minde, had not, nor used to have, or were accustomed, every yeare at the first day of *August*, called *Lammas* day, and from thence to the next Feast of the Purification then next following, Common of pasture in the aforesayd place in which, &c. onely for three Horses, Mares, or Geldings, and not more, in manner and forme as the aforesayd *Robert Pargiter* and *John Phillips* above have alleadged; for Plea the sayd *Robert Kenrick* saith, That he long before the time of the taking of the Beasts aforesayd, and also at the same time of the taking, &c. was seised of the Mannor of *Kings Sutton* with the appurtenances in *Kings Sutton* and *Astrop* in the County aforesayd, whereof the aforesayd Messuage and four Virges of Land with the appurtenances, whereof, &c. are and at the aforesayd time of the taking, &c. and also time out of mind, &c. were parcell, in his Demesne, as of Fee; and the aforesayd House and foure Virges of Land, with the appurtenances thereof, &c. and of the taking, and likewise time out of mind, were parcell of the Demesne Lands of the Mannor of *Kings Sutton* aforesayd: And the sayd *Robert Kenrick* so of the Mannor aforesayd, with the appurtenances in manner aforesayd



sayd appearing seised, the sayd *Robert*, before the sayd time in which, &c. put his Beasts aforesayd, which then were the proper Beasts of the sayd *Robert Kenrick*, upon the aforesayd House and four Virges of Land with the appurtenances, lying and rising in the aforesayd place in which, &c. to eate the Grasse there growing in the sayd place, in which, &c. called *Great Greens*, parcell, &c. the Grasse in the same then growing, feeding, and the aforesayd Beasts were in the place aforesayd, untill the aforesayd *Robert Pargiter* and *John Phillips*, the aforesayd fourth day of *August*, the seventh yeare aforesayd, at *Kings Sutton* aforesayd, in the County aforesayd, at *Great Greene*, parcell, &c. took the sayd Beasts of the sayd *Robert Kenrick*, and those unjustly detained, against Sureties and Pledges, untill, &c. as he above against those complaines, and this he is ready to verifie; whereof, and from which the aforesayd *Robert Pargiter* and *John Phillips*, the taking of the aforesayd Beasts in the aforesayd place, &c. further acknowledge, the sayd *Robert Kenrick* demands Judgment and his damages ( by reason of the taking and unjust detaining of those beasts ) to be adjudged unto him, &c.

¶ And the aforesaid *Robert Pargiter* and *John Phillips* say, that the aforesaid Plea of the said *Robert Kenrick* above in the Bar avowed pleaded, and matter therein contained, is very insufficient in Law, justly to avoid the said *Robert Pargiter* and the said *John* from just acknowledging the taking of the Beasts aforesaid, to have and shut up, and that he to the said plea in manner and forme aforesaid pleaded, hath no need, nor by the Law of the Land shall be held to answer, and this they are ready to averr, whereof for default of a sufficient plea of the aforesaid *Robert Kenrick* in this part, the said *Robert* and *John*, as before, demand Judgement, and Returne of the Beasts aforesaid, together with their Damages, &c. To them to be adjudged, &c. And the aforesaid *Robert Kenrick* in respect he hath sufficient matter in Law, justly to avoid the said *Robert Pargiter*, and the aforesaid *John* from justly acknowledging the taking of the said Beasts to be shut out as above alledged, which he is ready to verifie, which truly matter of the aforesaid *Robert Pargiter* and *John* do not answer according to their verifying, they altogether refuse to admit as before, and demand Judgment, and their Damages occasioned by the taking and unjust detaining of the said Beasts, to be adjudged to them, &c. And because, &c. Upon the pleadings the Case was thus, a Freeholder prescribts to have common in parcell of the Demesnes of the Mannor for six Horses and other Cattell in certain Land from *Lamm* to *Candlemas*, & that the Lord of the Mannor hath used to have the said Parcell of Land in severall to his owne use, from *Candlemas* to *Lamm*, and in consideration of that, the said Lord hath used to have Common in the said parcell

parcell of Land for Horses only and not more, and the Lord unjustly puts in other Beasts then the said three Horses in the said parcel of Land, and surcharged the Common, and the Free-holder distrayned them doing Damage, and the Lord brings a Replevin, and it was argued that prescription was not good, for that the Free-holder claimes that as Common without number, in his severall Soyle, the Grantee cannot exclude the owner of the Soyle, 12 H. 8. *Brook*, so of him which hath Common Fishing in the severall of another, he cannot exclude him which hath the severall, 18 H. 6. 16. And it is not like to the Case of the time of *Edward* the first, prescription the 55. Where is Prescription that the Owner of the Soyle shall be excluded from his Common for part of the yeare, for there the other claimes all the Vesture of the Land, and so may well exclude the Lord, but not when he claimes it but as Common, but it was agreed that by Lawes by the Commoners consent they may order that their great Cattell shall be put in in such Feild only, untill such a Feast, and after that for sheep and swine, and this is good, as it appears by 46 Ed. 3. 25. And *Coke* cheife Justice said, that such prescription to have Common and to exclude the Owner of the Soyle, is not good, and he saith that so it hath been adjudged between *Whyte of Shirland*, 31 Eliz. And in *Cletherwoods* Case of the *Middle Temple*, but he said that Prescription to have all the Vesture of the Land, is good for such a time, and at the first day of the Argument of this Case, *Foster* Justice seemed that the prescription was good, and might have reasonable beginning, that is by Grant, as if they have Common together, and they agree that one shall have all for one part of the yeare, and the other for another part of the year, and that shall be good, to which *Coke* answered, that that cannot be by Prescription to have that as Common, and at another day *Coke*, cited *Shirland* and *Whites* Case to be adjudged, 26 of Eliz. in the Kings Bench, to be prescription to have common in the Waste of the Lord, and to exclude the Lord to have common in the place, and adjudged to be void prescription, and also he cited a case between *Chimery* and *Fist*, where prescription was to have common in the Soyle of the Lord, and that the Lord shall have feeding but for so many cattell, and adjudged that the Prescription was not good to exclude the Lord, but a man may prescribe to have the first Crop, or the first Vesture of anothers Land, and it is good, and with that agrees the resolution in *Kiddermisters* Case in the Star-Chamber; *Warburton* Justice said, that this prescription is not for the excluding of the Lord, but for their good ordering of their Lands, according to the Book of 46 Ed. 3. 25. before cited, that the great Cattell should have the first feeding, and after that the sheep: *Coke* said, that if it had appeared by the pleading, that all the Demesnes of the

the Lord ought to be common, and in consideration, that the Lord had inclosed part, and enjoyed that in severall, the Free-holders and Tenants of the Mannor which have Common over all the Residue, and exclude the Lord, and this shall be good by prescription, and it is adjourned, see 15 Ed. 2. *Fitzherbert* Prescription 51.

And afterwards in *Trinity Terme 1612. 10. Jacobi*, this case was moved againe, and all the Justices agreed as this Pleading is, Judgment shall be given for the Plaintiff, and they moved the parties to plead.

Pasch. 9. Jacobi, in the *Common Bench*.

*Portington against Rogers. Trin. 8. Jacobi, Rot. 3823.*

**M**ARY *Portington* brought a Trespasse against *Robert Rogers* and others Defendants, for the breaking of her house and Close, upon not guilty pleaded and speciall Verdict found, the Case was this, A man had Issue three Daughters, and made his Will in writing, and by that devised certain Land to the youngest Daughter in taile, the Remainder to the Eldest Daughter in taile, the Remainder to the middlemost daughter in taile, with *Proviso*, that if my sayd daughters or any of them, or any other Person or persons befor enamed, to whom any estate of Inheritance in possession or Remainder, of, in, or to the said Lands, limited or appointed by this my last Will and Testament, or to the Heires before mentioned of them or any of them, shall joyntly or severally by themselves, or together with any other, willingly, apparently, and advisedly, conclude and agree, to or for the doing or execution of any Act or Devise whereby or wherewith the said Premises so to them intailed as aforesaid, or any part or parcell thereof, or any estate or Remainder thereof, shall or may by any way or means be discontinued, aliened or put away from such person or persons and their Heires, or any of them, contrary to mine intent and meaning in this my Will, otherwise then for a Joynture, or shall willingly or advisedly commit or do any act or thing, whereby the premises or any part thereof, shall not or may not descend, remaine, or come to such persons, and in such sort and order, as I have before limited and appointed by this my last Will and Testament, then I will limit, declare, and appoint, that then my said Daughter or Daughters, or other the said person or persons before named, and every of them, so concluding and agreeing, to or for the doing or execution of any such act or Devise as is aforesaid, shall immediately from and after such concluding and agreeing loose and forfeit, and be utterly barred and excluded of and from

*Trespasse.*

all and every such Estate, Remainder, and benefit, as shee or they, or any of them should, might, or ought justly, to have, claime, Challenge, and demand, of, in, or to so much thereof, as such conclusion or agreement shall extend unto or concern, in such manner and forme, as if she or they, or any of them, had not been named nor mentioned in this my last Will and Testament, and that the Estate of such person, &c. shall cease and determine, &c. And after that the youngest Daughter tooke a Husband, and then shee and her Husband concluded and agreed to suffer a Recovery, and so to barr the Remainder, and upon that the Plaintiff being the eldest Daughter entred, and upon the Entry brought this Action: And *Harris* Serjeant argued for the Defendant, that this shall be a condition and not a limitation, and he said that *Mews and Scholiasticae* Case is not adjudged against him, see the Commentaries, 412. b. And it shall be taken strictly, for that, that it comes in Defesans of the Estate, and then admitting it is a condition it is not broken, for this conclusion and agreement is only the agreement of the Husband, and though that the Wife be joyned, yet be that for her benefit or prejudice, that shall be intended only the Act of the Husband, and he only shall be charged, as in the 48 *Ed. 3.* 18. Husband and Wife joyne in Contract, and the Husband only brings Action upon that, and 45 *Ed. 3.* 11. Husband and Wife joyne in Covenant, and the Action was brought against them both, and it was abated, for that shall charge the Husband only, 24 *Ed. 3.* 38 The Husband and the Wife joyne in an Action upon the Statute of Laborers, and the Writ abated, and so in cases of Free-hold, as 15 *Ed. 4.* 29. b. The Husband and the Wife being Tenants for life, joyne in praying aid of a stranger, and this shall be no forfeiture of the Estate of the Wife, and 48 *Ed. 3.* 12. a. Statute Merchant was made to the husband and Wife and they joyned in Defesans, that shall not be Defesans of the Wife, and 28 *H. 8.* *Dyer* 6. The Husband of the Wife Executrix, aliens the Tearme which was let to the Testator upon condition, that he or his Executors should not alien, and by *Baldwin* by the alienation of the Husband the Condition was not broken, for it was out of the words, so here the agreement and conclusion being made by Husband and Wife shall be intended the Act of the Husband only, and so out of the Words, and by consequence, out of the intent of the Condition, and shall be taken strictly, but he seemed that the Condition shall be void, for the Words (conclude and agree) are words uncertain, for what shall be said conclusion and agreement within the said Provision, and for that as it seemes it is so uncertain as going about, but admitting that it is good, yet it shall be good but to some purpose, but not to restraine the Daughter which was Tenant in taile, to do lawfull Acts, as to suffer



fer a Recovery, or to levy a Fine, as it is resolved in *Mildmayes* case, 6 *Coke* 40. By which it appears that she hath as well power to dispose that by Recovery as of Fee simple, notwithstanding that the Reversion remains in the Giver, as it appears by 12 *Ed.* 4. 3. For all lawfull Acts made by Tenant in taile shall binde the Issue, as 44 *Ed.* 3. *Ottavian Lumbards* Case, Grant of Rent for Release of right is good, and shall binde the Issue, for there are foure incidents to an Estate taile, First, That he shall not be punished for Waste. Secondly, That his Wife shall be indowed. Thirdly, That the Husband of the Wife Tenant in Taile, shall be Tenant by the Courtise. Fourthly, That Tenant in Taile may suffer common recovery. So that a Condition which restraines him so that he cannot suffer a common Recovery is void, for it is incident to his act, and it is a lawfull Act, and for the benefit of the Issue as it is intended, in respect of the intended recompence, and he said that a Feoffment to a woman covert or infant, shall be conditionall, that they shall not make a Feoffment during their disability, is good, for that the Law hath then made them disable to make a Feoffment, so a Lease for life or years upon condition that he shall not alien, is good, in respect of the confidence that was reposed in them by the Lessor, and so concluded that the Condition in this Case which restraines Tenant in Taile generally from alienation. First, was uncertain in respect of the words (conclude and agree) Secondly for that it was against Law & so void, and for that prayed Judgment for the Defendant.

*Hutton* Serjeant for the Plaintiff, he argued that the verbal agreement of the Wife shall bind her, notwithstanding the Coverture, for that, that this is for her benefit, for in performance of the said agreement, she suffers a recovery to the use of her selfe and her Heires, and so Dockets the remainder, and he agreed the cases put by the other part which concerne free-hold, but he said in cases of Limitation of Estates, as if Limitation be, if a Ring be tendred by a woman that the Land shall remaine to her, and she takes a Husband, and after that she and the Husband tender the Ring, this shall be sufficient tender, and it shall be intended the Act of the wife, and 10. *H.* 7. 20. *a.* A man devises his Lands to a married woman to be sold, she may sell them to her Husband; And though that it be not any agreement of the Husband only, yet here is an act done, in a *Precipe* brought against the Wife, and she vouches over, for that is not only an agreement, but an Act executed, upon which the Estate Limited to the eldest Sister shall take effect, and the 21. *Coke* the 27. *a.* *Beckwiths* Case. If the Husband and the Wife, joyne in a Fine of Land of the Wife, the Wife only without the Husband may declare the use of that. And he intended it was a Limitation and not a condition,



and so it might be well at this day in case of devise, and then the Act shall be, that the Estate is Limited to have beginning, being made the Estate of the youngest Daughter which made the Act, shall be destroyed and determined, for if it be a condition, then all the Daughters shall take advantage of that, and this was not the intent of the Devisor, for they are the parties which should be restrained by the devise from Alienation. And also he cited *Wenlocke* and *Hamonds* Case cited in *Bractons* Case, 3. *Coke* 20. *b.* Where a Copy-holder in fee of Lands devisable in Burrough *English*, having three Sons and a Daughter, deviseth his Lands to his eldest Son, paying to his Daughter and to his other Sons forty shillings within two yeares after his death, the Devisor maketh surrender according to the use of his Will and dieth, the eldest Son admitted, and doth not pay the money within the two yeares, and adjudged that though the word payment makes a condition, yet in this case of devise the Law construes that to a Limitation, and the reason is there given to be, for that, that is, it shall be a condition, then that shall descend upon the eldest Son, and then it stands at his pleasure, if the Brothers or Sister shall be paid, or not, and 29. *Affis.* 17. cytes in *Nourse* and *Scholasticas* Case, Commentaries 412. *b.* where a man seised of Lands in Fee devisable, deviseth them to one for life, and that he should be Chapleine and single for his Soule all his life, so that after his decease, the sayd tenements should remaine to the Commonalty of the same Towne, to finde a Chapleine perpetuall for the same Tenements, and dyed, and adjudged that this shall not be a condition of which the heir shall take advantage, but limitation upon which the remainder shall take effect; and also he cyted *S.E. Clerks* Case, 6 *Coke* 18. *a.b.* & 11 *H.* 7. 17. & *Pennants* Case, 3 *Coke* 65. *a.* That if a man makes a Lease for years, upon a condition to cease, that after the condition is broken, grantee of reversion may take advantage of that; so he said in the case at the Bar, when the first Estate is determined and destroyed by the limitation, then he to whom the Remainder is limited shall take advantage of that, and not the Heire, for as he intended an Estate of Inheritance may as well cease by limitation of devise as tearme, as in 15 *Ed.* 4. Lands are given to one so long as he hath heires of his body, the remainder over, and if he dye without heires of his body, the remainder over shall vest without entry, and the Free-hold shall vest in him; and 2. and 3. *Phil.* and *Mary*, *Dyer* 127. and 56. *Fisher* and *Warrens* Case.

If a man devise Lands to one for life, the remainder over upon condition that if he do such an act that his estate shall cease, and he in remainder may immediately enter, there he in remainder shall take advantage though he be a stranger, for that that the Estate determines.

mines there without re-entry : And he saith, that the Case of *Wellock* and *Hamond*, cyted in *Barastons* Case, was a stronger Case then this, for there the limitation was upon Fee-simple, and here it is upon an Estate tayle ; and the Law hath favourable respect to devises, as in *Barastones* Case, is alteration of words for the better exposition of that, for *Shall* is altered to *Should* ; and also see 16 *Eliz.* *Dyer* 335. 29. for the marshalling of absurd words in a Will for the expounding of that ; and 18 *Eliz.* *Cheekes* Case, he cyted to be adjudged, that if a man devise his Lands to his Wife, and after her death to his Son, and the remainder to his sayd Wife in Fee-simple, the Husband of the Wife having Issue, shall not be Tenant by the Curtesie, for alwayes the Judges have made such favourable construction of Wills, that if Estates devised by Will might be created by act executed in the life of the party, then it should be good by devise ; and to the objection ( that conclusion and agreement is uncertaine, and so for that shall be voyd ; he saith that it is not so uncertaine, as going about, or resolve and determine an attempt or procure, as in *Corbets* Case, first of *Coke* 83. b. or as attempt or endeavour, as in *Germans* and *Arscotts* Case there cyted, fol. 285. a. See 6 *Coke* 40. a. *Mildmayes* Case, and also the words subsequent are repugnant, that the Estate tayle shall cease, as if the Tenant in tayle were dead, and not otherwise, which is absurd and repugnant, for the Estate tayle doth not determine by his death, if he doe not dye without Issue : And also he sayd, that it is more reasonable that the perpetuity in *Scholasticus* Case, for here the limitation depends upon agreement, which is a thing certaine, upon which the Issue may be joyned ; and also the condition doth stand with the nature of the Estate tayle, and for the preservation of it ; and Recovery is against the nature of it, for this destroyes the Estate tayle, and is onely a consequent of it, and not parcell of the nature of the Estate, and this is the reason that *Littleton* saith, That an Estate tayle upon condition that he should not alien, is good, for that preserves the Estate, and also preserves *Formedon* for him in reversion, if there be a discontinuance ; and with that agreed 13 *H.* 7. 23. 24. and he sayd, that there was a Judgement in the point for his Clyent for another part of the Land, and he cyted 31 *Edw.* 5. *Fitz.* *Feoffment placito the last*, and *Fitzherberts Natura brevium* (*Ex gravi querela*) last Case ; and so concluded and prayed judgement for the Plaintiff ; and this Case was argued againe by *Shirley* Serjeant for the Defendant, and he intended that the agreement is voyd to the Wife, and shall be intended the agreement of the Husband onely, for a married Wife cannot countermand Livery, 21 *Affis.* 25. and if a Woman makes a Feoffment upon condition to enfeof upon request made by her, and she takes a Husband, she cannot make request after coverture, 35 *Affis.*

*ssarum*: So that he intended that this shall be intended the agreement of the Husband onely, and not of the Wife, and yet he argued that Declaration of a use by a married Wife, shall be good, according to *Beckwiths Case*: But he said, That the reason of that is, for that that she is party to the Recovery, which is a matter of Record, and as long as the Record remains in force, so long the Declaration of the use shall be good; and also he argued, that if the condition being, that if the Wife conclude or agree to any act to make discontinuance, that then, &c. that that shall be intended unlawfull acts, and Recovery is no unlawfull act, and for that shall not be within the restraint of the Condition, as the Earl of *Arundels Case*, 17 *Eliz. Dyer* 343. and admitting that it is a limitation, yet it shall be of the same nature as a condition, and as well as a condition, that Tenant in tail shall not suffer Recovery, is void.

So also is such Limitation void, and so it was intended before the Statute of *Donis Conditionalibus* and it appears by the pleading, that the parties did not intend to take advantage of the agreement, for it is pleaded that at the time of the Recovery suffered, the youngest Daughter was seised of an estate tail, the which could not be if her estate were determined and destroyed by the (agreement and conclusion) so that the last words make the Forfeiture; for the first are not unlawfull, and before the execution of the Recovery the estate tail is determined, and so he concluded, and praised Judgement for the Defendant, *Barker* Serjeant argued for the Plaintiff; It shall be intended a Limitation and not a condition, for a Will shall have favorable construction according to the intent of the Devisor, for a Joyntenant may devise to his Companion, 49. *Ed. 3.* and *Fitz. Na. Bre. Ex gravi querela*, last case. A man devises Land to his Wife for life upon condition, that if he marry, that it should remain over to his Son in tail, and the Wife marries, and the Son in remainder sues (*Ex Gravi querela*) by which it appears that it was a Limitation and not a condition, and 34. *Ed. 3.* devise was to one for life upon condition that if his Son disturbed him, that then it should remain over in tail, upon disturbance; he in Remainder in tail brings *Formedon*, by which it appears it was a Limitation, and with that agrees all the Justices in 29 *Affisarum* 17. And *Wellock and Hamonds Case* cited in *Barastons Case* before, and 18. *Eliz. Dyer* If Land be limited to no third person by the Devise, then the Heir shall enter for breaking the condition, and also he said, that it appears by *Littleton*, and 13 *H. 7.* 23. and 24, and 20 *H. 7.* and 17 *Eliz.* 343. the Earle of *Arundells*, case which conditioneth that Tenant in tail shall not alien, standeth with his Estate, but not with Fee simple, and so it is adjudged in *Newes* and *Scholasticus Case*, which is adjudged

judged in the point, which as he saith cannot be answered, and the Words of the Condition are not that her Estate taile shall cease as if shee had been dead, but as if she had not been named, which is not so repugnant or absurd as the other, and this compared to 34 *Ed.* 3. Where the Estate was limited till it was disturbed.

And he also argued, that the agreement of the Wife shall be a forfeiture notwithstanding the coverture, for when the Estate is granted upon such condition, he which hath the estate shall take it subject to the condition; as if two Lessees are, and one Seals the Counterpart onely, yet the other shall be bound by the Covenants contained in it; and 33 *H.* 6. 31. a Woman disavows to be Executor, notwithstanding that shee was married, and if *Precipe* had been brought against the Husband and Wife, the default of the Husband shall binde the Wife, and so she shall be punished for waste made during the coverture, and so concluded, and prayed judgement for the Plaintiff: *Foster* Justice, that an Estate of Free-hold shall not cease by agreement or conclusion without entry, for it is a matter of Inheritance and Free-hold, and it is not like to 33 *H.* 6. 31. which concerns Chattels and Goods; and *Walmesley* Justice accorded with him: *Warburton* Justice, it hath been adjudged in *Scho'asticas* Case, that the condition was good, and therefore he would not deliver his opinion without argument; *Coke* cheif Justice, that the agreement is void to a Woman married, for then she was married to a Husband, whom in her life she could not contradict, and a Devise upon Condition, that if she conclude or agree, as this Case is, is void, for it is a bare communication, upon which the Inheritance doth not depend, and so he said, it hath been twice adjudged, 6 in *Corbets Case*, and *Germins Case*, and *Arscotts Case*, and *Rhells Case* in *Littleton*, it was upon condition that he should not alien, and this was adjudged to be void; but yet if the condition were if he alien, and not if go about or intend, or conclude, or agree as in the case at the Bar, for there is no such case in all our Bookes as this.

Secondly, For that, that the Words are, if they do any act, that then the Estate shall cease, and this is repugnant, for when the Act is done, then the Estate taile is Batred, and cannot cease, but if it had been but a Feoffment, then the right had remained, and he said that such a condition had been void before the *Statute of Donis Conditionalibus*, when it was but Fee simple Conditionall, be it a Condition or a Limitation, and he said that *Scholasticas* Case is of Fine which is only discontinuance till the Proclamations are past, and if dead before may be avoided by *Remitter*, in *Germins* and *Arscotts* Case, the Condition was, that if he go about or indeavour, and this was adjudged to be void, though that it be in devise in respect



spect of the uncertainty, and he said that the (agreement or conclusion) is so uncertain, and may be well compared to that, for here the Estate shall cease by the agreement, as well as it may cease by the going about, also he seemed that the Freehold cannot cease without entry, for if use cannot cease without entry as he intends, much lesse a Freehold cannot, though it be by Devise, and he seemed that it shall be no limitation, but a Condition, and Judgment accordingly, if cause be not shewed the next Term, and in *Trinity* Teame then next ensuing this Case was argued againe by *Dodridge* Serjeant of the King for the Plaintiff, and he said that there are three questions to be disputed. First, If it be a good limitation. Secondly, If the recovery be a breach of that. Thirdly, Admitting that it may be broken, if the agreement of the Husband and the wife shall be said to breake it, and to the first he seemed that it is a limitation and not a condition, and such a Limitation that well might be with the Law, and that it is a Limitation it is agreed in *Scholasticas* Case, Commentaries, and the reason of the Judgment there is, that if the intent of the Devisor appears, that another shall take benefit of that and not the Heire, that then it shall be but a limitation and not a Condition, and he in remainder shall take benefit of that, and for that in the principall case *Mary* the Eldest Daughter, to whom the Remainder was limited, shall take benefit of that, and with this agrees the case of *Fitz. Na. Bre. Ex gravi querela* last case, that if a man devises Lands to his Wife for life, upon condition that if she marry that the Land shall remain over, and after she marryes, and he in Remainder sues by (*Gravi querela*) by which it appears that it is a limitation and not a condition, and with this agrees 2. and 3. *P. and M. 127. Dyer, Jasper Warrens* Case, where a man devises land to his Wife for life, upon condition to bring up his Sonn, Remainder over, and agreed to be a limitation and not a condition, and so he concluded this first point, that it is a limitation and not a condition. Secondly, that it is a lawfull limitation, for there is not any repugnancy in that, as it is in *Corebts* before cited, for there are no words of going about, for he agreed that this is absolutely uncertain and void, and so is *Germin & Arscots* case, where there is not only a going about, but repugnant going about for he ought to go about and before discontinuance, and then his Estate shall be void from the time of the going about and before discontinuance, but here it is upon (conclude and agree) plainly and apparently, and conclude and agree is issuable, and a Jury may try that, and it will not invegle any man, but the Law will not suffer Issue upon such incertainty as going about or purposing, but Attornements and Surrenders are but agreements, and yet are Issuable: And so in the principall case, and in *Mildmayes* Case 6 *Coke* it is agreed



greed that a condition that a Tenant in taile shall not suffer a Recovery is void, for Recovery is not restrained by the *Statute of Westminster* 2. but here it is not so but in generall, that he shall not conclude or agree to alien or discontinue, but that which cannot be a condition good in the particular, may be good in the generall, as *Littletons Case*, gift in taile upon condition that he should not alien is good, otherwise of Fee simple, with which 10 *H.* 7. 11. and 13 *H.* 7. 23. 24. accordingly.

Thirdly, That it is a breach of the limitation, Condition, that alienation and discontinuance be by Recovery, which is a lawfull act, and it is a privileged incident to the Estate taile, and though that the agreement was made by the Husband and the Wife during the Coverture, and so should be if the Husband and the Wife had levied a Fine; see 10 *H.* 7. 13. *Condition*, that if the condition had been expressed that they should not levy a Fine had been void, and here this verball agreement betwixt the Husband and the Wife and the third person shall be for Forfeiture of their Estates, for this is the agreement of the Wife as well as of the Husband, as it appears by *Becwithes Case* 2. *Coke* before cited, where the Husband and the Wife agree to levy a Fine, and that the Fine shall be to the use of the Connusee, this is good declaration of the use, though that it be of the Land of the Wife and during the Coverture, and cannot be avoided by the Wife after the death of her Husband, for it was the agreement of the Wife, though it be not by any Indenture to declare the use of the Fine, so many acts in the Country made by the Husband and the Wife, shall be intended the act of the Wife, as well as of the Husband, as in the 17 *Ed.* 3. 9. The Abbot of *Peterboroughs Case*, the Husband and Wife granted Rent for equality of partition, and this shall binde the Wife after the death of the Husband, for it is her act as well as the act of the Husband, and shall be intended for her benefit, and so hereby the Recovery the Wife shall be Tenant in Fee simple, which was Tenant in taile before, and 34 *Ed.* 3. 42. feoffment to a married Wife upon condition to re-enseoff, and she with her Husband makes the re-enseoffment it is good; so a Woman being Lessee for Life, and with her Husband attorn upon a Grant of Reversion, is good, and shall binde the Wife after the Death of the Husband, 3 *Ed.* 3. 42. 4 *Ed.* 3. *Attornment* 12. 15 *Ed.* 3. *Attornment*, also this Estate was made to the Wife when she was sole, and for that it shall be accounted her folly, that she would take such a Husband that would forfeit her Estate, but with that agreed the reason of the Booke of 20 *H.* 6. 28. Where a woman Tenant was bound by the ceasing of her Husband, and so he concluded and prayed Judgment for the Plaintiff, and so it was adjourned, see another argument of this case in *Michaelsmas Term* 9. *Jacobi* 1611. by *Haughton and Nicholls Serjeants*.

*Pasch. 9. Jacobi, 1611. In the Common Bench.*

*Pitts against Dowse.*

*Ejectione firme.*

**I**N an *Ejectione firme* upon not guilty pleaded, The Case was this, A man makes his Will, by these words, I bequeath all my Lands to my Son *Richard*, except my Chauntry Lands. And I devise all my Chauntry Lands to be devided amongst all my Children, men and women alike, except my Son *Richard*. And if *Richard* die without Issue, the remainder to *A*. My second Son, the remainder to *B*. My third Son, the remainder to *C*. My fourth Son, the remainder to my next of blood, and so from Heire to Heire. And so likewise I would to be done upon my Chauntry Lands and Tenements, in case all my aforesaid Children die without Issue. Then I would the one halfe of my Chauntry Lands to remaine to the next of kin, and the other half to the Hospitall of *M*. And the question was, what estate the Heire of the eldest Son shall have in the Chauntry Lands, and it was argued by *Dodridge* the Kings Serjeant, that the Heire of the eldest Son shall have estate tayl in the Chauntry Lands, the Devisor devises no estate to *Richard* his eldest Son in the Chauntry Lands, nor limitts any estate of that in certaine, and for that he seemed that the youngest Sons and Daughters shall be Tenants in Common for life, and by this manner of Interpretation, every part of the Will shall be, for first he excludes *Richard* himselfe, so that he shall have nothing in that, and then by the Limitation to the younger Children to be equally divided between them, makes them Tenants in Common, see 28. H. 8. 25. *Dyer* 155. And he cited *Lewin* and *Coxes* Case, to be adjudged, *Michaelmasse* 41. and 42. of *Eliz. Pasche* 42. *Eliz. Rot.* 207. Where a man devises Lands to his two Sons to be equally divided, and adjudged that they are Tenants in Common; so devise to two part and part like, and equally divided, and equally to be divided is all one, and for that there is no other words to make an estate of Inheritance, it shall be an estate for life, and the remainder shall be directed according to the estates limited of the other Land. And he seemed that the words in the last sentence, all my aforesaid Children, shall extend to *Richard* his eldest Son, as well as to the others, and so all the Will shall stand in his force, which may be Objected that *Richard* the eldest Son shall be excluded out of the Possession, and for that see 6. *Eliz. Dyer* 333. 29. *Chapmans* Case, and also he cited one case to be adjudged, *Trinity* 37. *Eliz. Rot.* 632. betweene *Bedford* and *Vernam*, where a man deviseth all his lands in *Alworth*, and afterwards purchaseth

chafeth other Lands in the same Town, and afterwards one comes to him to take a Lease of this Land newly purchased, which the Testator refused to Let. And said, that these Lands newly purchased should goe as his other Lands. And upon his Death bed adds a Codycell to his Will, but saith nothing of his purchased Lands, and adjudged that the purchased Lands shall passe, and so concluded and praied Judgement: *Harris Serjeant*, that it is a new Sentence, and *Richard* is excluded and it shall be a good Estate tayl to the youngest Children, and foresayd Children shall be intended them to which the Chauntry Lands are limited, see *Ratcliffes* case 3. of *Coke* adjudged, that they shall be Tenants in Common by the devise to be equally divided, and shall not be surviving, but every youngest Children shall have his part in tayl; though that the first words do not containe words of Inheritance, yet the last words, in case all my Childrendie without Issue, declares his intent that they should have an estate tayl, see the 16. of *Eliz. Dyer* 339. 20. *Claches* Case, that when he hath disposed of part devised to *Richard*, then disposeth of the residue, and the sentence begins with ( And so likewise ) and that shall be intended in the same manner as he had disposed of the Lands devised to *Richard*, for he hath devised the remainder otherwise, that is, to an Hospitall, and so concludes and praies Judgement accordingly. *Coke* cheife Justice saith, that it was adjudged between *Coke* and *Petwiches* 29. *Eliz.* that if a man devise a house to his eldest Son in tayl, and another house to his second Son in tayl, and the third house to the third Son in tayl, and if any of them die without Issue, the remainder to the other two equally, this shall be but for life, for this enures to the quantity of the Land, and not to the quality of the Estate: And he said that *Richard* is excepted without question, for it is but a Will, and every of the youngest Sons therein shall have the Chauntry Land one after another, and *Richard* shall have no part, and the Chauntry shall have nothing till they all are dead, and he likened that to *Frenchams* Case, where Lands were given to one and to his Heires Males, and if he died without Issue, the remainder over, the Issues Females shall not take, though that it be if they die without Issue, for expresse it makes to cease only, and so it was adjourned.

## Peto's Case.

**P**eto suffers a common Recovery, to the use of himselfe for life, the remainder to his eldest Son in tayl, with diverse remainders over, to the intent that such Annuities should be paid

Common Recovery.

as he by his last Will or by grant declares, so that they did not exceed the sum of sixty pound, and if any of the said Rents be behind, then to the use of him to whom the Rent shall be behind, till the Rent be satisfied with clause of distresse: Rent of twenty pound was granted to his youngest Son for his life, the grantee distraines for the Rent, and in *Replevin* avowes, the Plaintiffe replies, that by the non-payment the use riseth to the youngest Son, by which it was objected that the Rent shall be suspended; *Quere* if without demand, or if the distresse shall be demanded, or that the use shall not rise till after the distresse, and to the distresse well taken, and agreed by all that the Plaintiff shall take nothing by his Writ, and that the eldest Brother hath nothing in the Land.

Judgement in  
Debt.

Judgement was had against a Defendant in Debt, and *Capias* to satisfie awarded, and (*Non est inventus*) returned, and *Scire facias* awarded against the Bayl, and upon the first *Scire facias*, the principall Defendant yeelds his Body in execution, and it was very good, for before that the Bayl had no day in Court, and in the Kings Bench if the Defendant yeelds his Body upon the second *Scire facias* it shall be accepted; And if a man be Bayl upon a Writ of Error, if the Judgement shall not be reversed, he shall be in execution againe: It was objected by *Hutton* Serjeant, that the *Scire facias* is against the Bayl, to know why the execution shall not be awarded against the Bayl, and that ought to be delivered to the Sherif, before the day of the returne, or otherwise it shall be Erroniously awarded, and then the party may yeeld his Body to Prison at any time, and discharge his Bayl, and agreed that Bayl in this Court may be released.

Accompt.

Accompt doth not lie for any sum certaine.

*Pasch. 9. Jacobi 1611, in the Common Bench.*

John Reyner against Powell. See *Hillary* 8. Jacobi, 136.

**H**ughton Serjeant argued, that there shall be a good Estate tayl of a Copy-hold, and that by the custome after the making of the Statute of *Westminster* 2. And he agreed that at the Common Law, all estates were Fee simple absolute or conditionall, and that the estates tayl were created by the Statute of *Westminster* 2. And do not exclude customary estates, as it appears by *Littleton*, who saith, that Tenant at will by copy of Court Roll by custome may be in Fee simple, and so of estate tayl, and with this agrees many other Authors, 15 *H. 8. b.* Tenant by Copy-hold of Court Roll resolved in the point, and that a *Formedon* in the descender lieth for that,



that, and as the Statute of *Westminster 2.* divides estate tayl and Fee simple, So may custome of a Mannor as well as custome make an estate at will, which is personall and determines by the death of any of the parties to discend, and as well as the custome of *London* (of not moving things fixed) is created by custome, as well may *Formedon* be created by Custome, and also the Statute is, that gives *Cui in vita*, extends to a Copy-hold, so the Statute of Limitation, as it appeares by *Brooke*, Limitation, 5 *Ed. 6.* And with this agrees also *Heydens Case*, and though that the words are, *Voluntas Donatoris* in the Charter, &c. Yet the estate tayl may be created by devise. So that the Statute shall not have such literal construction, and as well as a Lease for a hundred yeares may be within the Statute of 11. *H. 7.* Which speakes only of discontinuances, as it appeares by *Sir George Brownes Case*, 3. *Coke*, So may a Copy-hold estate which is but an estate at will be within the Statute of *Westminster 2.* and it is confest by the other part, by pleading that he was seised in tayl according to the custome of the Mannor, and it is not pleaded that he had Issue at the time of the Alienation, and the other party claimed by the Alienation, the which was not good, if he had no Issue at the time of that if he had but Fee simple conditionall, and so concluded and praied Judgement, &c.

*Dedridge* Serjeant of the king saith, that the reputation of the estate consists upon two parts, first the name, secondly the nature of the estate tayl, and for both the makers of the Statute of *Westminster 2.* had no intention that this should extend to Copy-hold, and first for the name, which gives the being, he cited *Fitz. Natura Brevium*. 12. *C.* where it is sayd, that Copy-Tenants, or Copy-holders, or Tenants by copy, is but a new Terme found; for of auncient times they were called Tenants in Villenage or of base tenure, as this also appeares by the old Tenures, by which it appeares that then they were called and named Tenants, which held in Villenage or of base tenure, and *Bracton*, booke 2. chap. 8. in the end speakes of that, and calls them Villaines; Sokemaines, and that if such a Tenant will transfer his Tenement, let it be delivered into the hand of the Lord or his Steward, and he wrote immediately before the Statute of *Westminster 2.* and agreed with *Fitz. Na. Bre.* And also *Bracton*, booke 4. fol. 209. Saith, that such Tenants have used to Plow the Demesnes of the Lord, and calls and names them as before, and 4. *Ed. 1.* He is called *Cuslemarius*; So that Custome doth not make the certainty of his estate if he hath any, and he said that 42. *Ed. 3.* 25. is the first in Law; in which is any mention of these Lands, and there they are called Neists Lands, and 14. *H. 4.* 323. a. they are called Sokemaines by base



base Tenure, and *Lambert* calles it *Folkland*, by which and severall names he saith, that the basenesse of the Estate appeares, And to the estate he saith that originally it was but at the will of the Lord, though that it be according to the Custome of the Manaor, So that the Lord cannot put him out if he performe the services. And the Register doth not respect him, for he hath not framed any Originall for him, to give him remedy by the Common Law, but only in the Court of the Lord, though that erroneous Judgement be given: Also he cannot prescribe but in the name of the Lord, as it appeares by 18. *Ed. 3. Fitz.* prescription, that such estates which are incident to Fee simple, as Dower, not Tenants by the Curtise cannot be derived out of this without Custome, nor that warranted. So that his reputation appeares by his name and also by his nature: Also he intended that the makers of the Statute of *Westminster 2.* did not intend that the Statute should extend to this, for it is, *Oppositum in Objecto*, for Custome is without time of memory. And the Statute of *Westminster 2.* was made 13. *Ed. 1.* the beginning of which every one knowes. Also the Statute of *Westminster 2.* doth not extend to any Lands, but those which the Tenant might have aliened before the Statute. But the Copy-holder had not any power to alien, for the Lord ought to be his Instrument and hand, as *Bracton* saith, to alien, transfer he cannot, but by the hands of the Lord, and it must be restored to the Lord, the words of the Statute are, The will of the giver in the Charter, &c. So that the Statute intends such Lands which may passe by Deed and Fine, and devise his Deeds, and the Deed extends to them, for a Fine is *Chirograph*, and devise to be made by copy of Court Roll is not so, for that is only of Acts made in the Court of the Lord, it cannot be within the Statute, for Copy-hold ought to be held of the Lord, and Tenant in tayl shall hold of the giver, and so cannot a Copy-holder, which hath so base an estate. And if this shall be so, these mischeifes will insue. That is, that this base estate should be of better security, then any estate at the Common Law, for Fine shall not be a Barr of that, for it cannot be levied of that, also Recovery cannot be suffered of that, for there cannot be a Recovery in value neither of Lands at the Common Law, neither of Customary Lands, for they cannot be transferred but by the hands of the Lord.

And to *Littleton* he agreed, and also, 4 *Ed. 2.* which agrees with this, where it is said that at *Stebenhearb*, a Surrender was of Copy-hold Lands to one and the Heires of his Body, but he said, that that shall not be an Estate taile, for then the Estate hath such operation, that this setles a Reversion and Tenure betwixt the Giver, and him to whom it is given, but this cannot be of Copy-hold Land,  
for

for this cannot be held of any, but only of the Lord, and to the others, this Estate doth not lye in Tenure, and yet he agreed that of some things which did not lye in Tenure, Estate Tail may be, but Land may be intailed, but Copy-hold Estate is so base, that an Estate tail cannot be derived out of it, so that though that custome may make an Estate to one and the Heires of his Body, yet this cannot be an Estate taile but Fee-simple conditionall, and also he agreed that they might have *Formedon in Descender*, but it is the same *Formedon*, which was before the *Statute*, as if Tenant in Fee-simple conditionall before the *Statute*, would alien before issue, but it was no Estate taile, with the priviledges of an Estate taile before the *Statute*, and to the other matter of Surrender, that is the admittance of the parties which is an Estate taile, that doth not conclude the Court, as it appears by the *Lord Barkleys Case* in the Commentaries, where the Estate pleaded severally by the parties is not traversed by any of them, and so concludes, and prayes Judgment, &c. And this case was argued again in *Trinity Terme* next ensuing by *Montague* the Kings Serjeant for the *Defendant*, and he said, that there are three questions in the case.

First, If Copy-hold land may be intailed. Secondly, Admitting that it may be intailed, if Surrender makes discontinuance. Thirdly, If it shall be Remitter; and to the first, he seemed that it might be intailed and that it shall be within the *Statute of Westminster 2.* And first for the Antiquity of that, he said that *Littleton* placed that amongst his Estates of Free-hold, and hath been time out of minde, and is a primitive Estate, and not derived out of the Estate of the Lord, and the Lord is not the Creator of that, but the means to convey that after that it is created, and what is created then shall have all the priviledges and Benefits which are incident to it, and shall be nursed by the custome, and is time out of minde, and the Law alwaies takes notice of it, and he cited, 24 *H. 4.* 323. by *Hankf. Bratton, Firz. Na. Bre. 12 C. and Brownes Case 4. Coke*, which is not simply an Estate at the will of the Lord, but at the Will of the Lord according to the custome of the Mannor, and when it hath gained the reputation of Free-hold, then it shall be directed according to the rules of the Common Law, and 2. and 3. *P. and Ma. Dier 114. 60.* allow Copy-hold Estate to be intailed, and he saith, That no *Statute* hath more liberall exposition then the *Statute of Westminster 2. 45. Ed. 3.* Incumbrance shall not charge the Issue intaile, also a Copy-holder shall have a *Cui in vita*, also a Copy-hold is within the *Statute* of Limitation; and so upon the *Statute* of buying of pretended rights: And it is alway intended when a *Statute* speaks of Lands and Tenements, that Copy-hold Lands shall be within that: And he saith, That all the Objections which have been made

made of the contrary part are answered in *Heydons Case*, but he relied upon that, that every reall Inheritance is within the *Statute of Westminster* 2. 4 Ed. 2. *Formedon* lyeth of Copy-hold Land, 25 Ed. 3. 46. Estate tayle is of a Corrody and office, which proves, that Copy-hold is a reall Inheritance, and for that shall be within the *Statute*, 46 Ed. 3. 21. Gavelkinde Land may be intailed, 6 *Rich.* 2. *Avowry* 2. 8 *Rich.* 2. 26. Copy-holder shall be charged with Fees of a Knight at Parliament, 22 and 23. *Eliz. Dier* 373. 13. Lands in ancient Demefne were intayled, and he said that the reason is, that for that it is Inheritance and time hath applyed them to an Estate, and so concluded, and prayed Judgment for the Defendant.

*Hutton* Serjeant argued for the Plaintiff, that Copy-hold Lands cannot be intailed, for that is but a customary Estate; and the Law doth not take any notice of it, but onely according to Custome, for there were no Estates tayle before the *Statute*, for then all were Fee simple absolute or conditionall; that is, either implied, or by limitation, which cannot be of an Estate tayle, which is not within the *Statute of Westminster* 2. for no Actions are maintainable by that, but those which are by the Custome, and a Writ of false Judgment: See *Fitzherberts Natura brevium*, 12. 13 Ed. 3. *F. Prescription* 29. that it hath no Incidents, which are incident to Estates at the Common Law without Custome, as Dower: See *Revett's Case*, and so is Tenancy by the Curtesie, and there shall be no descent of that to take away Entry, and so of other derivatives: And he seemed that it is not within the *Statute* for three reasons apparent within the *Statute*.

First, That it is hard that Givers shall be barred of their reversions; but in case of Copy-holds, the Giver hath no remedy to compell the Lord to admit him after the Estate tayle spent, but onely *Subpena*, and in this Case the Lord may relieive himselfe for the losse of his services, for that the *Statute* provides no remedy for him.

Secondly, That the *Statute* doth not intend any Lands, but those of which there is actuall reversion or remainder, and those which passe by Deed; so that the will of the Giver expressed in the Charter, may be observed, and of which there may be a subdivision, as Lord, Mesne, and Tenant; for there shall be alwayes a reversion of the Estate tayle, and the Donee shall hold of the Donor and not of the Lord.

Also it seems that the *Statute* doth not intend to provide for any, but those for whom the Writ in the *Formedon* ordained by the *Statute* lyeth, and agreed that for Offices and such like, *Formedon* lyeth, if the party will admit Estate tayle to be discontinued.

Also the *Statute* intends those things, of which a Fine may be levied, for the *Statute* provides, that (the Fine in his owne right should be

be nothing ) but by Copy-holder Fine cannot be levied, and for that he shall not be within the *Statute*, and if the Words do not extend to that, then the Equity of the *Statute* shall not extend to that, and he said that Copy-hold is not within any of the *Statutes*, which are made in the same yeare, as the *Statute which gives Elegit*, and such like, and to *Littleton* that an Estate by copy, is where Lands are given in Fee-simple, Fee-taile, and that *Formedon* lies for that with which agrees 10 *Ed. 2. Formedon* 55. It seems that the Estate taile here mentioned, shall be intended Fee-simple conditionall at the Common Law, and the *Formedon in Discender* which was at the Common Law, for alienation before Issue: And so *Littleton* shall be intended, For the Estate is within time of memory; see *Heydons* case, that a Copy-hold Estate is an Estate in being within the *Statute* of 31 *H. 8.* And *Manwood* there said, that inso-much the Estate of that is created by custome, and the Estate taile is created by *Statute*, yet it shall not be within the *Statute*, and he said that the case of 15 *H. 8. B. Copy of Court* 24. is repugnant in it self in the words of *Formedon*, for he saith, though that *Formedon* was given by *Statute*, and was no otherwise in *Discender*, yet now this Writ lies at the Common Law, and it shall be intended, that this hath been a custome there, time out of minde, &c. And so he concluded, and prayed Judgment for the Plaintiff.

*Pasche* 9. *Jacobi* 1611. in the Common Bench.

Yet Bearblock and Read.

SEE the beginning before *Hillary* 8. *Jacobi*, this Case was argued by *Hutton* Serjeant, that the Plaintiff in the Action of Debt ought to Recover, for if Executor may pay Debt due by the Testator by Obligation, before Debt due by Judgement, this shall be a (*Devastavit*) as it is resolved in *Trewinyards* Case, 6. and 7. *Edward* 6. *Dyer* 80. 53. And he shall be charged for the Judgement with his owne goods. And so it was adjudged between *Bond* and *Hales* 31. *Eliz.* that Judgement at the Common Law shall be first satisfied before the Statute, which is but a Pockett Record, and *Medium redditer in invitum*. Also it was adjudged in *Harrissons* Case, 5. *Coke* 28. b. That Debt due upon an Obligation shall be first payd before Statute with Defeasans for performing of Covenants, the which Defeasans is not broken, and also it is adjudged between *Pemberton* and *Barkham* here cited, that Judgement shall be satisfied before Statute Merchant or Staple or Recognizance, though that the Statute be acknowledged before the Judgement had by the Testator. See this Case in *Harrissons*

See the beginning, fol.



Case, 5. *Coke* 28. b, and in 4. *Coke* 60. a. *Sadlers Case*, upon which he infers, that if an Executor first satisfy a Statute or a Recognisance before a Judgement, that this shall be a *Devastavit*, as well as if he satisfies an Obligation, first as in *Trewynyards Case*, and that when the Plaintiff which hath Judgement, the Executor may aid himself by *Audita querela* by this matter subsequent: *Quere of Doffar Druryes Case*, as in 7. H. 6. 42, in *Detinue against Gamishe*, and Judgement had for the Plaintiff. If the Judgement be reversed, restitution shall be made to every one which hath losse. So here by *Audita Querela*, if the Executrix hath not more then was taken in execution by the Statute, and it seemes to him that the Judgement in the *Scire Facias* shall not be a Barr in this Action, for the Judgment remaines, Executrix and the Plaintiff may have Action of Debt upon that. But of the contrary, if the Plaintiff had brought Action of Debt upon the Judgement and had been barred, then shall be barred in *Scire Facias* also: But the Plaintiff this notwithstanding, may have *Scire Facias* upon surmise, that there are new assets, come to the hands of the Executor, and so he concluded and praised Judgement for the Plaintiff. *Nicholls* Serjeant for the Defendant relies only upon the Judgement had upon the *Scire Facias*, and that till that he Defeated, the Plaintiff cannot maintaine Action of Debt, for the Action of Debt is nothing but demanding of Execution, and for that till the first Judgement be Defeated the Plaintiff hath no remedy at the Common Law. All things which barr the Execution of the Judgement in *Scire Facias*, these shall be Barrs in an Action of Debt, as in *Baxters Case* here last adjudged, in an Action upon the Case for slanderous words, the Defendant pleads that he had justified the speaking of these words, at another time in another Action brought against him, and had a verdict and Judgement upon that, and so demands Judgement, and adjudged a good Plea, till the first Judgement is reversed, for Judgement is the saying of the Law, and 13. *Eliz. Dyer* 299. 34. in Debt for Costs recovered in a Writ of entry, the Defendant pleads that the Plaintiff hath sued an *Elegit*, which was Execured, and a good Barr in an Action of Debt, and so 1. and 2. *P. and M. Dyer* 107. 24. In Debt for Damages recovered in Affise, the Defendant pleads in Barr, that after the verdict given and before Judgement, the Plaintiff entred into the Land, and there no Judgement is given. But it seemes if the Plaintiff sayl of Course that the Common Law prescribes, that then he shall not have Execution, (for of those things which rightly are Acted let there be Executions) but if the Defendant in the first Action had pleaded a release, and Judgement was given upon that against him, he cannot plead that againe, (for it runs into the thing Judged,) 34.



Ed. 3. in Debt against an Executor, and part of the assets found, the Plaintiff cannot have new *Scire Facias* without Averment that there are new assets, and 34. H. 6. Action with averment that there are assets, and Judgement good both waies, and presidents shewed of both Courts. And he intended that the Executor could not have helped himselfe by *Audita Querela*, unlesse he feares to be impleaded, but after Execution he cannot have Restitution, and so concluded and praied Judgement for the Defendant: *Coke* cheife Justice, that there cannot be a *Devastavit* in the Wife, unlesse that it be voluntary payment by her, for the Statute of 23. H. 8. gives present Execution of a Statute *Staple* without *Scire Facias*. So that the Wife had no time to plead the Judgement, and for that this unvoluntary Act, shall not be a *Devastavit*, for she is no agent, but only a sufferer. And at the Common Law if the Plaintiff hath Judgement in an Action of Debt after the yeare he hath no remedy, but new Originall, and this mischeife was remedied by the Statute of *Magna Charta*, which gives *Scire Facias* in place of new Action. But it seemes to him that the Barr in the *Scire Facias* shall remaine good Barr, till it be reversed, as in 2 Rich. 3. A man hath election to have action of *Detinue*, or action of *Trespasse*, and he brings his action of *Detinue*, and the Plaintiff wages his Law, and after brings an action of *Trespasse*, and the first Nonsuit pleaded in Barr, and adjudged a good Barr, 12 Edw. 4. accordingly: *Foster, Walmesley, and Warburton*, agreed without any doubt, but they sayd, that if the first execution had been had by Covin, then it should have been otherwise.

In Debt upon buying of diverse severall things, the Defendant confesseth part, and for the residue the action being brought by an Executor in the *Detinet* onely, the Defendant pleads, he oweth him nothing; and upon this Tryall was had, and Verdict for the Plaintiff, and after Verdict it was moved, that this misjoyning of Issue was ayded by the Statute of *Jeofailes*; but it was resolved by all the Justices, that it was not ayded, for it was no misjoyning of the Issue, but no Issue at all; but if there had been Issue joyned, though that it were not upon the direct matter, yet this shall be ayded, and at the end the Plaintiff remitted the part that the Issue was joyned, and prayed Judgment for the residue, and this was granted, but if the Plaintiff had been nonsuited that would go to all.

Administrators during the minority had judgment in debt, and before execution sued, the Executor came to his age of seventeen yeares, and how this execution shall be sued comes the question, for the power of the Administrator was determined by the attaining of age of 17. yeares by the Executor, and the Executor was not party to the Record, and for that he could not sue execution; but it

Debt by Executor.

Administrators during the minority of the Executor.

Action upon  
the Case for  
words.

seems that the Executor may sue speciall *Scire facias* upon the Record, and so sue execution in his owne name: See 27 H. 8. 7. a.

Action upon the Case for these words (*He hath stolne forty Staure of Lead* (meaning Lead in Staure) from the Minster; and resolved by all, that action doth not lye, for it shall be intended that the Lead was parcell of the Minster, and the (*Innuenda*) shall not helpe that.

Palche 9. Jacobi 1611. In Common Bench.

Crane against Colepit.

Replevin, At-  
tornement of  
Tenant, being  
under age of  
21. yeares.

**T**Homas Crane Plaintiff in Replevin against Bartholemew Colepit, the only question was, if Tenant by descent of the age of twenty years and more, ought under one and twenty yeares to attorn to a Grant of the signiory or not, and it was adjudged that the Attornement is good for three reasons.

First, For that he gives no Interest, and for that it cannot be upon condition; for it is but a bare assent.

Secondly, His Ancestors held the same Land by the payment of the Rent and making of their Services, and it is reason that the Rent should be paid, and the Services performed, and for that though that he shall have his age for the Land, yet for the Rent he shall not have his age, and though that it is agreed in 32 Ed. 3. That he shall have his age (*In per que servitia*) yet after his full age the Grantee shall distrain for all the arterages due from the first, so that the Attornement is no prejudice for this Infant, and he is in the number of those which shall be compellable to attorn, see 41 Ed. 3. age. 23. 26 Ed. 3. 32. 32 Ed. 3. and 31 Ed. 3. *Per que servitia*, 9 Ed. 3. 38. 32 Ed. 3. Infant of the age of three years attorned, and good, and 3 Ed. 3. 42. Husband attornes and that shall bind the Wife, 12 Ed. 4. 4. 18 H. 6. Attornement of an Infant is good to binde him, for that it is a lawfull act.

Thirdly, The Attornement is a perfect thing, of which the Law requires the finishing, that is, the grant of the signiory which is not perfect, till the Tenant attorn, and Foster Justice said, that so it had been adjudged in this Court in the time of the Reigne of Elizabeth, in which Judgment all the Justices agreed with one voyce, without any contradiction, See 26 Ed. 3. 62.

Palch.

*Pasch. 9. Jacobi, 1611. In the Common Bench.*

As yet *Rowles* against *Mason*, see the beginning, *Michaelmas*  
8. *Jacobi*.

**D**odrige Serjeant of the King argued for the *Plaintiff*, he saith that there are two Copies, first that a Copy-holder for life under a 100. l. may nominate his Successor. Secondly, That such Copy-holder after such nomination may cut down all the Trees growing upon his Copy-hold and sell them, and he saith that it hath been adjudged that the custome that Copy-holder for life may sell the Trees growing upon his Copy-hold is void, between *Popham and Hill*, *Hillary 45 Eliz. in this Court*, so if the first custome doth not make difference by the nomination, the second is resolved to be void, and it seemes to him that the first custome hath not make difference, and to the objection that the first custome hath been adjudged to be good between *Bale and Crab*, he saith that the custome adjudged, and this custome as it is found differs in many points. First, It was found that every Copy-holder for life solely seised without Remainder, but here is sole Tenant in possession, and this may be where there is a Remainder, so that uncertainty in this makes the custome void, as in *6 Ed. 3.* custome that an Infant at the age of discretion may alien is void for uncertainty, also in the case here it is found, that the Copy-holder may name who shall be next Tenant to the Lord, and doth not say to whom the nomination shall be made, but in the first case the custome is found to be, that the nomination ought to be to the Lord in the presence of two Copy-holders, also in the first it is found, that if they cannot agree of the Fine, that the Homage shall assess it; but in this custome here found there is not any mention of that he ought to seek to be admitted, and doth not say at what court, the which ought to be shewed in certain, as it is resolved in *Penimans Case*, *5 Coke 84.* Where custome that a Feoffment ought to be inrolled, is expressed, shall be inrolled at the next court, also in the first case to be found that after the Fine is paid or offered, he which is named shall be admitted, and here is not any mention of that, so that he concluded that this is a new custome, and not the same custome which was in question between *Bayle and Colepit*, also it is found that the trees were cut immediately after nomination of a new Tenant, and before any admittance or Fine paid for him; so that insomuch that the Benefit was not equall as well as to the Lord as to the Tenant, as in *2 Ed. 4. 28.* and *22 Ed. 4. 80.* For plowing and turning upon the Land of another, for that the custome shall be void. And to the second custome also it seems

seems, that that is voyd and unreasonable. First, for that when any is alledged in the custome, that is inconvenient, though that it be not mischeivous, yet the custome shall be void, as in 4. *Affisarum* 27. in *Affise* brought against an Abbot, which pleads custome, that all the houses of the South side of the street shall be devisable, and he claimes by force of a Devise made according to that custome and adjudged that the custome is not good, for it is inconvenient that in one self same ancient Town one house shall be devisable and another not, and upon that the Plea was amended, so here, custome that a Copy-holder may sell all the Trees is inconvenient, for it doth not appeare that this Custome extended to any other but to him: Secondly this Custome is against the Common Wealth, for every Custome ought to have preservation and maintenance, and that shall not be here, for when one Copy-holder hath sold all the Trees, the Successor shall not have any Boots nor Fire, and so by the same reason he may pull down the house. And so this tends to destruction, and rests in the will of a man if he will destroy or not. And this is inconvenient that such power should be given to one, which hath but an estate for life, as in 14. *Ed. 3. Barr* 277. Copy-holder pleads Custome of a Mannor, that that Copy-holder which comes first after a windfall sale, shall have it, and resolved to be void Custome, for that it rests in the will of a man if he will finde that or not. So in 5. *H. 7. 9.* Custome that if one find Beasts doing Dammage that he may distraine them, and have foure pence for his Dammages, and adjudged void Custome, for the Dammages are uncertaine, and for that it is no reason that the Fine shall be certaine, and 19. *Eliz. Dyer* 358. 46. Custome that all Devises and Leases, granted for more then six yeares are meerly void forthwith, is a void Custome, because contrary to common reason, and the liberty of one which hath Fee simple. So 2 *Hen. 4. 24.* Custome that the Tenants of the Mannor shall not use their Common till the Lord put in his Beasts, is void, for it should not depend on the Will of the Lord; So in the principall case the Lord cannot grant Copy-hold Estate in reversion, for it depends upon the Nomination of his Tenant, and for that the Custome shall be void.

Thirdly, The Copy-holder hath prescribed to do a thing which is contrary to his Estate, and doth not cohere with his Estate, that is, that Lessee for life shall cut the Trees, for he hath but a speciall property in that, and not the absolute property, and it is like to a Case in 19 *Ed. 3. Feoffments* 68. and 19 *Affise* 9. Where Commander of an Hospitall prescribes, that he and his Predecessors, which have had the same office, have used to make Leases for lives, and in an Action brought by the Prior it was adjudged that the custome is void, and so by consequence the Lease was void, for the Commander



der hath no Estate to make it, so in *Forse and Hemlings Case*, 4. *Coke*, and 3 *Ed. 3. F. Dat.* Custome that a married Wife may make a Will is void, for it doth not stand with the quality of her person, so here it is not with the quality of the Estate, but it may be objected that it is a greater Estate, then an Estate for life, for it is perpetuall Free-hold; to that it may be answered in this case, it is no greater Estate then for life, for the Copy-holder hath only made nomination, but he which was nominated was not admitted, so that the Tenant hath no greater Estate, nor the Lord hath granted greater Estate then for life, but admit that he be Tenant for life, with a Remainder for life to him to whom the nomination is made, yet he cannot do such an act, and for that the cutting down of the Trees shall be a forfeiture of his Estate by custome, by which the Estate is created, and copy-hold Lands are not as other Lands, which if they were let for Life at the common Law, the Tenant were punishable for wast, till the *Statute of Gloucester*, for it was the Folly of the Lessor to make a Lease to such a person, which would make wast, and for that, as the benefit and Priviledge of the copy-holder remaines, so the benefit of the Lord shall not be abridged, and so he prayed Judgment for the Plaintiff.

*Haughton* Serjeant seemeth the contrary for the Defendant, and he agreed that Customes ought to be reasonable, and if they be generally inconvenient, they cannot be reasonable; and to the first exception, to prove that it is a new Custome; that is, that it is found that he is onely Tenant in possession, without saying, Without Remainder, as it was in the first Case; to that he thought if it were true, that the Copy-holder hath such priviledge that he might nominate his Successor, it is not materiall, and to the lessening of the Fine, that is found very certaine, for he that is nominated at the first requires admittance, and if the Lord refuse that he shall be admitted, for such a Fine that the Homage Assess, and so it is found, and that is very certaine, and the rather for that, that this is a speciall Verdict.

Also he agreed as before, That Custome ought to be reasonable, and if it be generally inconvenient, though it be not mischeivous, yet it shall not be good; and to the Case of 40 *Assis.* 37. Custome to devise the Tenements on the South side of the Streer, is not good, for that, that Custome cannot be in one particular place certaine; and also he agreed the Case of Windfall, for that tended to charge the Lord, 3 *Eliz. Dyer* 299. 57. 58. Custome to have Herriot the best Beast, and if that be put out of the way before seisure, then the Lord may seise and take the Beast of any other mans there arising and lying downe; to his owne proper use, and the custome held voyd and unreasonable: So the custome in 20 *H.* 7. to have so much for



for every Pound-breach is voyd ; but this custome is meerly between the Lord and Tenant, and the custome hath made that discendable Inheritance, and also may have reasonable beginning, and the Lord hath benefit for that ; that is, his Fine for the admittance of him which is nominated ; and custome hath created other Estates, as Grant to him and his, is good by the custome, and so the Cases of 21 *Ed. 4.* and 22 *Ed. 4.* before cyted, for the turning of Plough upon the Land of his Neighbour : So the custome if the Lord feed the Beasts of his Tenant that he may Fold them ; and so he concluded that the first custome to make nomination is good ; and to the second custome, he agreed that bare Copy-holder for life, could not Prescribe to cut and sell all the Trees, no more then custome that Tenant for life may devise, as 35 *H. 6.* But here the Tenant hath perpetuity in his Estate, and may nominate his Successor, and as well as the Common Law allows Tenant after possibility of Issue extinct, to make waste ; so may custome allow Tenant for life with such nomination, power to cut and sell the Trees : Also he intended, admitting the custome not good, that yet the Copy-holder hath not forfeited his Estate, for the Trees and the Mannor are granted by severall Grants, and for that, though that they are by one selfe same Deed, yet by that the Trees are severed from the Mannor, and the Trees are the cause of the forfeiture, and they are no parcell of the Mannor, as in 31 *Edw. 3. Affis. 441.* by sale of a Castle the services are extinct.

So here the forfeiture cannot accrue to the Mannor, when that commeth by reason of Trees, which are severed by reason of severall Grants ; and he thought that the Grant shall be taken more strong, against him which made it ; as if a man in the Premises give Fee-simple, to have in tayl, the Estate tayl shall be precedent, and the Fee-simple depending upon that ; so if a man have the next avoydance of a Church, and the Church becomes voyd. and after he purchase the Advowson, yet the Presentation remaines as it was before, for that is the best thing, and so it is resolved in *Herlackendens Case*, 4 *Coke* 63. *b.* That if a man makes a Lease for yeares of Land, except the Trees, and after grants the Trees to the Lessee, that the Trees are not reunited to the Land, and so he concluded that it shall be no forfeiture, and prayed Judgment for the Defendant ; and this Case was argued againe, *Michaelmas, 9 Jacobi*, by Shirley for the Plaintiff, that the first custome was voyd, inso much that he claimed to doe a greater thing then his Estate would warrant, as in 35 *H. 6.* Custome that if one Pawne the Goods of another, that he which hath them Pawned may keep them whosoever they were, is not good, as Custome that the Tenant in tayle may devise, is voyd, for his Estate will not warrant it, and it is prejudice to the Tenant in re-

version :

Shirley.

version: So Custome that Copy-holder shall have Common, and another Custome, that none shall put in his Beasts till the Lord put in his, 2. *H.* 4. 24. Also there is no Fine Limited to be tendred by the Tenant, or to be demanded by the Lord: And if a Copy-holder refuse to pay his Fine it is a Forfeiture, and if the Custome do not provide for the Fine of the Lord as for the Copy-holder, the Custome shall be void: Also here cannot be admittance, for *Littleton* saith, that the sole meanes to transfer Copy-hold is by Surrender. And here if the Custome should be good, the copy-hold should be transferred by Nomination only, and so the Lord should be Defeated of his Fine, and it seemes also that the second Custome is void, for it is contrary to the Estate of a copy-holder, to sell all the Trees, but he agreed that he might have Estovers for houseboote and hedgboote, as it was adjudged in *Swayne* and *Becketts* Case, and he cited the 19. *assf.* Where a Commoner made a Lease for life, and void, for that that the Estate would not support it, 9. *H.* 6. 56. and 11. *H.* 6. 40. Prescription to sell Estovers is void, for Estovers are appropriate to a house: And also it was adjudged in this Court between *Poltocke* and *Powell*, that a copy-holder for life cannot prescribe to sell the Trees, for it is contrary to his Estate, as if a Custome be, that if a Feoffor die his Heire within age, that he shall be in Ward, as 8. *H.* 6. And he thought that the Nomination was no alteration, for he to whom the Nomination is made, hath only an Estate for life, when the Nomination is made, and that doth not warrant the sale of the Trees, and to the third it seemes that the Lord of the Mannor bargain and sells the Trees, and after lets the Mannor to the bargainee for years, and then copy-holder makes wast, he thought that the Trees were not severed from the Mannor, as in 33. *H.* 8. 48. *Dyer* 2. if a man bargain and sell a Mannor, and after in the same Deed makes a bargain and sale of an Advowson appendant, this remaines appendant: So if a man bargain and sell a Mannor, and also the Trees do not passe till Livery be made of the Mannor, So if Lessee for yeares, gives and grants the Land, and makes a Letter of Attorney to make Livery, the tearme passes without Livery, and then it is a Forfeiture: And here the Lessee shall have the benefit of Shade and Burrough, and the Trees themselves during the Tearme, as parcell of the Land, and then when the copy-holder hath done more then his Estate will warrant, this is a forfeiture, and the Lessee shall take the advantage of it, and so he praied Judgement for the Plaintiff: *Harris* for the Defendant that the Customes are good, but admitting that so, yet the Plaintiff shall not take advantage of it, and he argued that Custome ought to have two properties; first reasonable, secondly ought to have time to make

*Harris.*

that perfect, and then shall be good, as it appears by the examples of *Littleton* f. 37. of Burrough *English* and Gavelkind, and custome may be against common right, but not against common reason, which is the common Law, 8 *Ed.* 4. 18. 21 *Ed.* 3. 4. And he intended here that the second custome is good, if the first be good, for then it is perpetuall Free-hold, and Copy-hold Estate of Inheritance is but an Estate at will at the Common Law, and yet such Copy-holder may dispose the Trees, as well as custome may create the Estate, as well may it give such privilege, as custome may warrant the taking of Toll for passing over the soile of another, 22 *Affise* 58. And so custome to have the Foldage of the Beasts which feeds upon his soile is good, but custome for paying the Goods of another is not good, for there is not any recompence, but fishing in the Sea and to dig the soile adjoining for landing of his Nets is good, for this is for the publick good, 8 *Ed.* 4. 23. So the custome for turning upon head-land of another is good, and is for the preservation of Tilling, and also it is between Lord and Tenant, and shall be intended to have a reasonable beginning for consideration, &c. That this continues, for he hath Fines and other Services, and yet 3 *Eliz.* 199. *Dyer*. If the Lord claim Harriot of his Tenant, and if it be Esloyned, alledge custome, that he may take the Beasts that he found upon the Land in *Withernam*; and this was adjudged unreasonable custome, so 20 *H.* 7. 13. Custome to have three shillings of a stranger for pound-breach is void, but of a Tenant is otherwise, for it shall be intended to be a lawfull beginning, 11 *H.* 7. 40. So here the beginning shal be intended to be lawfull and for valuable consideration, and for this it shall be good; and to the second custome it follows by consequence to be a good custome, if the first should be good, and then to the third he agreed that Copyholder cannot make wast, and if he do it shall be a forfeiture of his Estate, as it is said by *Hull*, 9 *H.* 4. *Wast* 59. but this ought to be such Wast that is prejudiciall to the Inheritance, as it is agreed in *Hertackendens* case, 4 *Coke*, Where it is agreed that the Bargainee hath severall Interests in the Land and in the Trees, and by the Writings, by the making of the Lease of the Mannor they are not reunited and annexed to the Free-hold again, and then the cutting and selling is no prejudice to him in reversion, and so no Wast to make forfeiture, and so he concluded and prayed Judgment for the Defendant and is adjourned, see the beginning, *fol.*

Trinity 9. Jacobi 1611. *In the Common Bench.*

As yet Doctor Hufseys Case, see Hillary 8. Jacobi.

**I**N the Writ of Raviſhment of Ward, between Francis Moore Esquire Plaintiff, against Doctor Huſſey and Katharine his Wife, Robert Wakeman Clark, and many other Defendants, Dodridge the Kings Serjeant argued for the Defendant Doctor Huſſey, that a married Wife is not within the Statute of Westminster 2. chapter 35. By which the Writ of Raviſhment of Ward is given, that which before the Statute was only Treſpaſſe, is by the Statute altered in manner and form of proceedings and in penalty of Judgment, and he thought that this Writ being formed upon the Statute doth not extend to a married Wife, for by the Statute if the Defendant, cannot ſatisfie for the marriage he muſt abjure the Realme, or ſhall have perpetuall Imprisonment, which goes neer to every man next unto his Life, the love of his Country and liberry, and those the makers of the Statute did not intend against a married Wife, and he grounded his argument upon these words of the Statute, by which it appears that the makers of the Statute, did not intend any person which had no property in any Goods nor power to make satisfaction.

For first the Statute provides, that if he be able to make satisfaction, that then he should satisfy, if not that then he shall abjure the Realme, by which it appears that the Statute intends those that have property, and by possibility may satisfy, but a woman cannot, for her marriage is a gift of all her goods personall to her Husband, see for that *Fox and Girtbrookes Case Commentaries*.

Secondly, The Statute provides new form of proceedings, for if the Ward or any of the parties dy hanging the Writ, the Writ shall not abate, but it shall be revived by Reſummons, by or against the Executors of him that is dead, by this it appears that he which hath no power to make Executors, shall not be intended to be within the Statute, and a married Wife cannot make a Will, and by consequence cannot make Executors, see *Coke 6. a. Forſe and Hemblins case*, 3 Ed. 3. *Devise* 13. 4 H. 6. 6. and if the Executors have no aſſets, then the statute gives remedy against the Heir.

Thirdly, The Statute intends to give action against him which may have poſſeſſion of the ward, the which a married Wife cannot have, for her poſſeſſion is to the use of the Husband, and by the words of the Statute, he against whom the Action is given ought to be made *Fidei poſſeſſor*, and to the objection, that though that the Wife married cannot by any poſſibility have ſufficient to make ſatis-



faction according to the intent of the *Statute*, yet if the Husband hath sufficient, he shall answer for his Wife, as in 48 *Ed.* 3. 26. and 17 *H.* 6. A married wife shall be attached by the Goods of the Husband, he saith that there the reason is, that the Wife is answerable by the Husband, but this is only to make him to appear, but he against whom the action is given, by this *statute* ought to have property, and in such cases a married Wife shall not be punished, as in the same Parliament *Westminster* 2. chapter 25. Is provided, that if a Disseisor faile of Record that he shall be imprisoned, in *Affise*, for this is the speedy remedy, but if a married wife pleads a Record and failes of that to the Jury; she shall not be imprisoned, though that the *Affise* was brought against the Husband and the Wife or against the Husband, and the wife is received, see 1.3 *Aff.* 1. 44 *aff.* 3. 17. *af.* 19. 11 *H.* 4.

Also the *Statute of Conjunctim Feoffatis*, fol. 99. Which was made in the time of the said King *Ed.* 3. in which time the *statute of Westminster* 2. was made, and is contemporary with the same *statute*, by which it is provided, that if any plead Joyntenancy, which is found against him in the *Affise*, that he shall be imprisoned by the space of a yeare, and 16 *Affise* 8. Husband pleads Joyntenancy with his wife, and maintaines the Exception which is found against them, and resolved that the Wife should not be imprisoned by this *statute*, 21 *Affise* 28. 31 *Affise* a. accordingly, and he said there was not any president nor Book of Record, by which it appears that a Writ of *Ravishment* of Ward, was maintained against a married Wife, for *Ravishment* after the Coverture, but for *Ravishment* before the Coverture, see 6 and 8. *Ed.* 3. and to the Objection that the Plaintiff hath election if he will have the sufficiency come in question, may but admit the Defendants to be sufficient, and then the imprisonment, nor the abjuration shall not be inflicted, as it seems to be some opinion, 8 *Ed.* 3. 52. and to that he saith, that the admittance of the parties cannot alter the Law, for if it were not the intent of the makers of the *Statute* that this should extend to the Wife, the admittance of the parties will not make that extend over the provision of that, also it seems to him that the Verdict is not perfect, for that it is not found by whom the VVard was married, but only that he appeared married, and it ought to be without the consent of the Plaintiff, and for that it might be that he was married by the Plaintiff, and then there is no cause of action, nor to have the value of the marriage, and it appears by 22 *R.* 2. *Damages* 130, that they ought to inquire by whom he is married, and also the value of the marriage, and if it doth not appear whether he be married or not, then the Verdict shall be conditionall and the Judgment also, and all the Presidents are, he appears married without the assent of the Plaintiff, and



and so he concluded, and prayed that the Judgment might stand: *Harris* Serjeant for the Plaintiff prays Judgment, and he supposed that it is in the choyce of the Plaintiff what Judgment he would have, for he ought to have Damages and the value of the marriage, and it remains in the discretion of the Plaintiff, what judgment he will have (that is) upon the Statute, for to have the corporall punishment, or allow the Defendants to be sufficient, and so to have judgment for the Damages, and the value of the Marriage, without any Imprisonment or Abjuration; as in 29 Ed. 3. 24. and 8 Ed. 3. 52. where the question was demanded of the Plaintiff, and in 22 Rich. 2. Damages 130. *Hankford* demanded the question, if the Jury ought to inquire if the Defendants were sufficient or not, and it was resolved that they need not; and in 34 H. 8. Trinity, Rot. 347. there is a President accordingly, where the Husband and the Wife were found guilty; and the Action was founded upon the Statute, and *Capias* awarded against them both, and to the sayling of the Record, it is reason that the Wife should not be imprisoned, for the Pleas are the Pleas of the Husband and his acts, and in the 11 H. 4. 51. and 21 Assf. 4. in Assise the Wife was received, and voucheth a Record, and failed, and no judgment upon that against the Husband, and the Wife was imprisoned; and so upon Allegation of Joyntenancy, the Wife was imprisoned; and so he concluded, and prayed judgment for the Plaintiff; and at another day the Case was argued againe by *Montague* the Kings Serjeant for the Defendant, that a married Wife was not within the Statute of Westminster 2. Chap. 35. And he sayd, that the true course for understanding the Statute, is to consider three things:

First the Common Law before the making of that Statute:

Secondly the mischeife that the Statute intended to remedy:

Thirdly against what persons the Statute intended to remedy such mischeifes: And to the first he intended that at the Common Law, before the making of the Statute, the Remedy for Ravishment of Ward, was an Action of Trespasse, as it appeares by *Fitz. Na. Bre.* And then it was questioned if the Plaintiff should recover the Body without Damages, or Damages only without the Body. See 9. Ed. 4. 48. Ed. 3. 20. 27. H. 6. And then there was no greater punishment, nor other remedy for the taking of the Ward, then of other goods, and for the remedy of that, the Statute of Westminster 2. chap. 35. was made, by which it is provided, that if the Ravisher restore the Ward unmarried, then the Plaintiff shall recover only Damages for the Ravishment, and not the value of the Ward: But if the Ward be married, then the Guardian shall recover the value of the marriage, and if he shall not satisfie, then he shall abjure the Kingdome, or have perpetuall Imprisonment, and

*Harris.*

*Montague.*

and the punishments inflicted by the Statute, being so penall: Then the persons which are within the Statute are considerable, for in all penall Lawes, the persons and the penalties are the things to be considered, and to the persons this Statute saith, that one for anothers Fault is not to be punished, and he said, this is referred to Damages, as well as to Imprisonment, and it is not a lost case, and the Plaintiff without remedy, for Action of Trespass lies against the Husband at the Common Law, for, for all Trespases at the Common Law done by a married Wife, the Husband shall be punished by payment of the Damages and costs which are recovered: See 14 H. 8. and 9. Ed. 4. But to the Statutes which are penall and inflict corporall punishment there otherwise, and as the Statute of 23 Eliz. made against Recusants for not resorting to Church, should forfeit twenty pounds for every moneth; and resolved that this shall extend to a married Wife, and for that the Husband shall be lyable to action: But by the third of Jacobi, there is speciall provision, that the Woman shall not be subject to twenty pounds a moneth, but other punishment provided for her; and he supposed that where a statute gives Imprisonment and Damages, and a married Wife offends the statute, and shall be imprisoned, but the Husband shall not pay the Damages, as in 8 H. 8. 18. Upon the statute of Westminster, a Woman was imprisoned for false appeals, for the death of her Husband, who was brought into the Court and lying; and in the 11 H. 4. 54. It is marvell that the statute of Westminster 2. gives the action to the Heire, inasmuch that Interest appears to the Executor: And for that Hill saith, That the statute was not made by those which were skilled in the Law, but he spake ill, saith the Reporter: Also the words of the statute, If the Ravisher cannot satisfie, he shall abjure the Realme, or have perpetuall Imprisonment, and the Wife cannot, by any possibility; make satisfaction, for she cannot have any Goods; so as this Case is, the statute would make perpetuall separation, either by abjuration or perpetuall Imprisonment, if this shall extend to a married Wife, as in 6 H. 7. was the question, whether a married Wife shall be Attached for that, and she had no Goods, as it is 48 Ed. 3. 2. the Sheriff returnes (*Nihil*) against a Monk, for that that he had no Goods, for all his Goods are the Goods of the Abbot, and it is impossible that a married Wife should have any Goods, and the Law doth not compell to impossible things: See 3 Ed. 4. 4 H. 6. Also the Statute saith, That if the Ravisher dye, hanging the Writ, let the Law proceed against his Executors by resummons, and a married Woman cannot make Executors; and to the like cases, he thought that a married Wife was not within the Statute of Offenders in Parks, and this gives the same punishment that the Statute gives,

gives, as it is resolved, 13 *Affs*. So if a married Wife sayle of a Record in *Affise*, she shall not be imprisoned, and the Husband is joyned onely for conformity, and for no other cause; and to the President of 34 *H. 5.* which hath been cyted here against the Husband and Wife, and Judgement by default against both, and upon this, *Capiatur* is awarded against them both, but this is onely for the Imprisonment but not for the Damages; and also this Case differs from that, for here the Husband is found Not guilty: Also it seems that the Book of Entry, 366. 15. lyes against Husband and Wife, and there they both plead, but if the Wife onely be condemned, the Husband shall not pay the Damages recovered against her, 44 *Ed. 3. 25.* As a Leale is made to the Husband and Wife, the Husband makes waste, and an Action of waste is brought against them both, and the Husband dyes, and the Writ abates, for the wrong dyes with him, and the Wife shall not be punished; and so prayed that the judgment might stay, and Doctor Hufsey not punished.

Hutton Serjeant for the Plainriff prayed that the Judgment might be entred, and first hee considered the Common Law, and after that the *Statute*; and at the Common Law hee agreed that a Trespasse lyes against the Husband and the Wife, for Ravishment made by the Wife, and in this hee should recover Damages against the Husband and the Wife, and the Husband shall be charged with the Damages, though it be but for words proceeding from her tongue, or any other Trespasse, and if the Husband make default, his body shall be imprisoned, so that it appears that there was remedy at the common Law by action of trespassse, and that the Husband was subject to that, then by consequence it was intended, that all persons which were chargeable by the common Law shall be chargeable by the *Statute*, and by the action which is formed upon that; and by the common Law the Husband was chargeable, and by consequence shall be chargeable by the *Statute*; and he intends that there would be difference between actuall wrongs, and others which are come by omission, and if the Wife be the person which did the wrong, then she shall be punished as well by *Statute*, as she was before by the common Law, also she shall be out-lawed, and it hath been agreed that *Ravishment of Ward* shall be maintainable against the Husband and the wife, if they both are Ravishers, and also if the wife be Ravisher before marriage, and after takes a Husband, the Husband shall be charged with the damages, and his Body shall be imprisoned; and by consequence shall be abjured, also shee may make an Executor by the consent of her Husband, but admitting that she could not, then the remedy is given against the Heir, and she shall be within this *Statute* as well as other *Statutes* made in the time of the said King, as the

Hutton.

the *Statute of Westminster* 1. 37. And shall be a Disseisor with force, and shall be imprisoned, whether the Husband joyn with her or not, as it is adjudged 16 *Affise* 7. for all *Statutes* which provide for actual wrong, a married VVife shall be intended within them, as it is 9 *H.* 4. 6. But the pleading of Joyntency, there the Plea is the act of the Husband, and so saying of Record, upon the *Statute* of 34 *Ed.* 3. as it is 16 *Affise* 8. for the Husband propounds the exception, but if the VVife propounds the exception, then she shall be within the *Statute* and shall be imprisoned, 21 *Affise*: So if a married VVife make actual disseisin with force she shall be imprisoned, 9 *H.* 4. 7. b. 8 *Ed.* 3. 52. 22 *Ed.* 2 *Damages* 20. 27 *H.* 6. *Ward* 118. And so the President, *Trinity* 33 *H.* 8. *Rot.* 347. in a case between *Thomas Earle of Rutland* against *Lawrence Savage* and his VVife in *Ravishment of Ward*, at the *Nisi prius* the Defendants make default, and the Judgment was, that the Husband and the VVife should be taken, and upon that he inferred, that the Husband should be subject and charged with the damages, and so it is taken upon the *statute* of 35. *Eliz.* That the Husband shall be charged with Debt for the Recusancy of the VVife, and shall be imprisoned for the not payment of it, as to the verdict it seems that this is good, and it shall be intended the VVard was married by the Defendants, as in 33 *Ed.* 3. *Verdict* 48. It is found by verdict, that *Mulier* enters, and resolved that this shall be intended in the life of the Bastard, or otherwise it is nothing worth, and in *Fulwoods* case 4 *Coke*, the Jury found that the Defendant acknowledged himself to be bound, and that shall be intended according to the *statute* of 23 *H.* 8. and so here though that it be not found, that the VVard was married by these Defendants, yet it shall be so intended, notwithstanding that nothing is found, but only that he appeared married, and so he concluded and prayed Judgment for the Plaintiff. This case was solemnly argued this Terme by all the Justices, that is, *Coke* and *Walmesley*, *Warberton* and *Foster*, and upon their solemn arguments, *Coke* and *Walmesley* were of opinion that a married wife is not within the *statute*, and *Warberton* and *Foster* were of the contrary opinion, and so by reason of their contrariety in opinion, the Judgment was staid.

*Trinity* 9. *Jacobi* 1611. in the *Common Bench*.

Burnham against Bayne.

THE case was, A Man seised of divers Lands, the halfe of them were extended by *Elegit*, and before Judgement was had against him, a new *Elegit* Awarded, and if all the halfe which remains



remaines, or but the halfe of that which was the fourth part of all should be extended was the question: And it was agreed by all the Justices, that but the halfe of that which remaines, and not the halfe of all, which he had at the time of the Judgement: But the halfe of that, which he had at the time of the *Elegit*: And if all which remaines be extended, the Extent shall be void, by all the Justices, see 10. *Ed. 2. Execution* 137, 16. *E. 2. Execution* 118. And here the principall case was, A man hath a Rent of forty pound, reserved upon a Lease for years, and two Judgments in Debt were had against him at the Suit of Sir *Thomas Cambell*, and three Judgments at the Suit of the Plaintiff, the halfe was first extended by *Elegit*, upon the first Judgment had, at the Suit of Sir *Thomas Cambell*, and after upon the Judgment had at his Suit, the halfe of the residue was extended and after upon the Judgment at the Suit of the Plaintiff all the residue was extended, and all the Justices agreed that the Extent was void, for they ought to extend but the halfe of that which remaines, and that was but the fourth part.

Trinity 9. Jacobi, 1611. *In the Common Bench.*

Trobervill against Brent.

**T**HE Case was, A man makes a Lease for yeares rendring Rent, and after grants the Reversion for life, to which Grant the Lessee for years attornes, the Grantee acknowledgeth a *statute*, and after surrenders his Estate, the Conusee extends the *Statute* and distraines for the Rent, and in *Replevin* avowes for the cause aforesaid, and adjudged that the Avowry was good. *Surrender after Statute acknowledged,*

Agreed that Creditor may sue the Executors, and the Heir of the Debtor also, but he shall have but one Execution with satisfaction, see the Statute of 23 *H. 8.* for such course in the Exchequer. *Executors sued and also the Heire.*

Note, that no Court of Equity, may examine any matter of Equity, after Judgment which was precedent the Judgment, see the Statute of 4 *H. 4. chapr. 23.* *Court of Equity.*

Trinity 9. Jacobi 1611. *In the Common Bench.*

Hamond against Jethro.

**T**He case was this, *Edward Hamond* was Plaintiff in Debt upon a Bill against *William Jethro*, and the Bill was made in this manner, *Memorandum*, that I *William Jethro* do owe and am indebted *Debt upon a Bill.*



red unto *Edward Hamond* in the Sum of ten pound, for the payment whereof, I binde my self, &c. In witnesse, and after the (in witnesse) it was thus subscribed, *Memorandum*, that the said *William Jethro* be not compelled to pay the said ten pound untill he recover thirty pound upon an obligation against *A. B. &c.* And in the Count was no mention made of this Subscription; but this appears when the Defendant prays, hearing of the Bill, the which was then entered *Verbatim* of Record, and upon that the Defendant demurred in Law. *Harris* Serjeant for the Plaintiff agreed; that if it had been in the Body of the Bill, it ought to have been contained in the Count to inable the Plaintiff to his action, but that which is after (in witnesse) is no parcell of the Bill, and for that it need not to be contained in the Count, 9 H. 6. 15, 16. A thing which doth not intitle the Plaintiff to action, need not to be contained in the Count, 36 H. 6. 6. If the condition, be indorced or subscribed, it need not to be contained in the Count; but if it be contained before the (in witnesse) then it ought to be contained in the Count, 21 Ed. 4. 36. If a man be bound to pay ten pounds when the Obligee carries two hundred load of Hay to his House, there the condition is precedent, and it ought to be contained in the Count, 22 Ed. 4. 42. accordingly: so here the matter is subsequent to the (in witnesse) and there is not any other matter upon which the action is founded, nor contained in the body of the Bill, nor to be performed by the Obligee, and for that he prayed Judgment for the Plaintiff. *Shirley* Serjeant for the Defendant, that the sealing is immediately after the Proviso, and is adjoyning to the Bill in writing, and for that be it to be performed of the part of the Plaintiff or Defendant, it ought to be mentioned in the Count, for this intitles the Plaintiff to his Action of the case in 36 H. 6. 6. It is a condition subsequent, and there need not to be shewed; but if the condition be precedent, and contained in the writing before the in sealing there, it ought to be mentioned in the Count: and in this principall case, this is either a condition Precedent or nothing, for it is, that he shall not be compelled to pay the sayd ten pounds untill he had recovered thirty pound, and if he never recover, he never shall pay the ten pound; and it is a condition of the part of the Defendant, and it is adjudged in *Ussard's* case, that where a condition is precedent, there it ought to be contained in the Count, but where it is subsequent, otherwise it is. So 15 H. 7. 1. Grant, that when the Grantor is promoted to a Benefice that he ought to give to the Grantee ten pound, this is precedent, but in the principall case it is a Condition or Covenant: and though that it be subsequent, yet it may stay the Suit as well as an acquittance, which is to be an acquittance if he be vexed, otherwise not, but a condition that he shall not sue the Bill is void, for it is contra-

ry to that, and bars him of all the fruit of that, and precedent condition may be placed after the (in Witnesse) as well as before, so he prayed Judgment for the *Defendant*: *Coke* cheife Justice said, that this which is after (in witnesse) is not part of the Deed, but may be a Condition or Defeasance; but if it be not (in witnesse) in the Deed, then it shall be parcell of the Bill; but though that this be put after the (in witnesse) yet it shall have his force as Defeasance, but it need not to be contained in the Count; for in Bonds and personall things, there need not such strict words as in other Deeds, and for that this shall be a good Condition or Defeasance; but then the *Defendant* ought to have that so pleaded, and not demurr, for this makes the Bill conditionall. *VVarberton and Foster* agreed, *VValmesley* did not gainsay it, and for that it was adjudged for the *Plaintiff*, if the *Defendant* did not shew cause to the contrary, by such a day, which was not done.

Note, It was adjudged by all the Justices, that fealty gives seisin of all annuall services sufficient to make seisin in avowry, but not in *Affise*, but of accidentall services, this gives seisin in *Affise*, and a man cannot take excessive distresse for that, for this is more sacred service, as *Littleton* saith of Homage, the most honourable: See 42 *Ed. 3.* 26. 11 *H. 4.* 2.

*Fealty gives  
Seisin of all an-  
nuall Services.*

Note, Two retain an Attorney, both dye, the Executor or Administrator of the survivor shall be onely charged, and not the Executors of them both, for a personall contract survives of both parties, otherwise of reall contracts, as warranty: See 16 *H. 7.* 13. a. 3 *Coke*, Sir *William Harberts* Case, 30 *Ed. 3.* 40. 17 *Ed. 3.* 8. The Attorney brought an Action of Debt against both, and the Executors of both the parties which retained him for his Fees, and both pleaded joyntly, that they detained nothing, and it was found for the Plaintiff, and upon motion in arrest of Judgement, the Judgement was stayed, insomuch that the Executor of the survivor was onely chargeable, notwithstanding the pleading and admission of the Parties.

*Attorney brings  
Action of Debt  
for Fees.*

Note, That it was agreed by all the Justices, that by the Law of Merchants, if two Merchants joyne in Trade, that of the increase of that, if one dye, the other shall not have the benefit by survivor: See *Fitzherberts Natura brevium*, *Accompt*, 38 *Ed. 3.* And so of two Joynt Shop-keepers, for they are Merchants; for as *Coke* saith, there are foure sorts of Merchants, that is, Merchant Adventurers, Merchants dormants, Merchants travelling, and Merchants residents, and amongst them all there shall be no benefit by survivor.

*Survivor doth  
not hold a-  
mongst Mer-  
chants to have  
all.*

*Ius accrescendi inter Mercatores locum non habet.*

Note, That Arbitrators awarded, that every of the parties should

Award void.

pay onely five Shillings for writing the award to the Clark, and agreed that the award was voyd to that part, and good for the residue, for they cannot award a thing to be made to a stranger.

Action upon the Case for words.

Action upon the Case was brought for these words, He is a Cozening Rogue, and hath cozened Richard Wood of thirty pound, and goeth about to doe the like by me, and agreed that the action doth not lye: So for Rogue or Cozener, for it is without aspersiō and gentle, and words shall be taken in the gentlest sēse.

Devise that Executors shall sell Land.

Devise that Executors shall sell Land with the assent of J. S. if J. S. dyes before that he assents, the Executors shall not sell; notwithstanding the death of J. S. was the act of God, and in the life time of J. S. they could not sell without his consent, and so it was agreed in the Case concerning Salisbury Schoole, where the under Schoole-Master was to be placed by the head Schoole-Master with the assent of two cheife Bailiffs, and it seems the head Schoole-Master cannot place without their consents.

A Towne incorporated with the consent of the greater part.

Action on the Case for slander.

Note, it was said to be adjudged that the Inhabitants of a Town cannot be incorporated, without the consent of the major part of them, and incorporation without their consent is void.

In action upon the case, the case was this, The Brother of the Defendant spoke these words to the Plaintiff, that is, Thou Theif, thou Goale whelpe, thou hast stolne a peice of Silver from my Master Hocken; and the Defendant sayd as insued, that is, That which my Brother spake is true, I will justifie it, and spend a hundred pounds in prooffe thereof; and it seems to the Court, that the Action doth not lye against the Defendant, insomuch that it doth not appeare by the Court, that he had notice of the words which his Brother spoke; but that this ought to be specially averred, and the Count contained that the Defendant justified the aforesayd scandalous words to be true, as in these English words following, That which my Brother, &c. and it seemes that this was not sufficient.

Michaelmas 1611. 9. Jacobi, In the Common Bench.

Sir Richard Buckley against Owen Wood.

Action upon the Case for saying one in a Court which hath no Jurisdiction.

Note, It was sayd to be adjudged between these parties, that if a man exhibits a Bill in the Starr Chamber, which contains diverse slanderous matters, whereof the Court hath no Jurisdiction, that an Action upon the Case lyeth; so if the Plaintiff affirme his Bill to be true, action upon the Case lyeth upon that, as it was adjudged upon that, as it was adjudged in the same Case.

Michaelmas

*Michaelmas 9. Jacobi 1611, in the Common Bench.*

Patrick against Lowre.

**I**N Trespasse the Defendant justifies, for that, that he was seised of a House with the Appurtenances, and prescribes to have Common in the place, &c. for all manner of Beasts, *Levant & Couchant* upon the sayd House, and good prescription, notwithstanding it doth not containe certaine number, and it shall be intended for so many of the Beasts, which may be rising and lying down upon the said House, and if he put in more they may be distrayned, doing Damage; and so is the usage and prescription in all Burroughs; that is, to prescribe to have the Common by reason of the House, but the matter upon which *Nicholls* the Serjeant which moved it insists was the uncertainty; that is, what shall be sayd rising and lying down upon a House, for he thought beasts could not be rising and lying down upon a House, unlesse that they are upon the top of the House, but to that it was resolved, that inso much that here the common was claymed to the House, it shall be intended that it was a curtillage belonging to the House, and if it be not, that ought to be averred of the other party, and then the Beasts shall be intended to be rising and lying upon the Curtillage, and if it had been alledged, yet it shall be intended so many of the Beasts which may be tyed and are usually to be maintained and remaining within the House, for it was agreed that (rising and lying down) shall be intended those Beasts which are nourished and fed upon the Land, and may there live in summer and winter, and also Beasts cannot be distrayned if they be not rising and lying down upon the Land and receiving food there for some reasonable time, but some thought that beasts could not be rising and lying down upon a house without a Curtillage.

*Prescription for Common for Beasts without number.*

Note that it was agreed that all proceedings in inferiour Court, after a Writ of Priviledge delivered out of this Court are void (and before no Judge) and if they award Execution, this Court will discharge the party of Execution.

*Priviledge out of higher Court.*

Note that a Fine was levied between *Charles Lynne* and *Walter Long*, and the Foote of the Fine was *Longle*, and it was amended.

*Fine amended.*

*Michaelmas*



*Michaelmas 9. Jacobi 1611. In the Common Bench.*

*Hamond Strangis Case.*

*Feoffment to a Son and Heir for a valuable consideration. Avowry.*

**T**HE Father for a valuable consideration infeofs his eldest son and Heir, and adjudged that this was not within the *statute* of those, who infeof their eldest Sons, nor a valuable consideration.

In Avowry, the Defendant avowes upon the person of the Plaintiff, in a Replevin, and the Plaintiff traverses the Tenure, upon which they are at issue, and at the *Nisi prius* it is found for the Plaintiff, and agreed that this was aided by the Statute of *Isouiles*, for this is out of the statute of 21 H. 8. and as it was at the common Law; or if the Defendant avow upon the person of a stranger, the stranger hath no plea, but out of his fee, which was mischeivous, the which was aided by the statute of 11 H. 8. 19. for he thought he would have traversed the Seisin.

*Teste of a Venire facias amended after verdict.*

The *Teste of a Venire facias* was the twelfth of June returnable, *très Trinitatis*, which was the same day that the *Teste* was, and after Verdict it was moved to be amended, and to be made according to the Roll, the which was done accordingly, see 7 Ed. 4. for returning of *Disfringis* which was amended after Verdict, and Crompton one of the *Prothonotaries* sayd, that a *Venire facias* bare date in the vacation after the Term returnable in the Terme before, and it was amended according to the Roll, and the principall case was, the Roll was upon the entering of the issue, therefore you shall cause to come here twelve good and lawfull men, who neither, &c. within three weeks of *Michaelmas*, and the return of the *Venire facias* was made accordingly.

*Michaelmas 9. Jacobi 1611. in the Common Bench.*

*John Weekes Plaintiff, Edward Bathurst Defendant.*

*Ejectione firme.*

**A**LSO in *Ejectione Firme*, upon the Joyning of the Issue, the Defendant pleads not Guilty, and it was entred, and the aforesaid Lessor, likewise, where it should have been, and the aforesaid Plaintiff likewise, and it was amended: See this Case afterwards here the Case was, the Defendant pleads, that he is not guilty as the aforesaid *Weekes*, which was the Lessor, above against him hath declared, and upon this he puts himself upon the Countrey, and the aforesaid *Weekes* likewise, where it should be the aforesaid *John* likewise, and after verdict upon solemn argument this was amended



amended by *Coke*, *Warburton*, and *Foster*, and *Foster* cited 11. H. 7. 2. 26. H. 6. to be directly in the point; and 14. Ed. 3. Amendment 46. Ed. 3. Amendment 53. and *Warburton* seemed that first, that is *Wekes* for the aforesaid *Wekes*, &c. Is not materiall, and the last shall be amended, inso much that this doth not alter any matter of substance, *Coke* seemed that this was amendable the same Terme by the Common Law, if it were before Issue, see 5 Ed. 3. 7 H. 6. Which was immediately before the statute of 22 Ed. 4. but in another terme it was not amendable by the Common Law, nor the statute of 14 Ed. 3. doth not extend to that, for this doth not extend to a Plea Roll, 46 Ed. 3. 13. accordingly, but the statute of 8 H. 6. extends to any misprision, in the Plea Roll, or in the Record, and makes that amendable, 26 H. 6. Amendment, 32. 9 and 10. *Eliz.* *Dyer* 260, 261. And the difference is, where there there is an Issue that gives power to the Justices of *Nisi prius* to try that, then another Misprision shall be afterwards amended; and he said that it was adjudged between Sir *William Read* & *Ezure* in the *Exchequer*, that a Commission of these words (and the aforesayd Plaintiff likewise) shall not be amended, but in the principall case here, they all agreed that it shall be amended, and it was amended accordingly.

Michaelmas 1611. 9. Jacobi, in the Common Bench.

Prowse against Worthinge. Leonard Loves Case.

**I**N an *Ejectione firme*, speciall Verdict, the case was this, *Leonard Loves* the Grand-Father, was seised of a Mannor held in chiefe, and of other Mannors and Lands held of a Common person in socage, and had Issue foure Sonns, *Thomas*, *William*, *Humphrey*, & *Richard*. And by his Deed 12 *Eliz.* covenants to convey these Mannors and Lands to the use of himself for his life, without impeachment of waste, and after his decease to the use of such Farmors and Tenants, and for such Estates as shall be contained in such Grants as he shall make them, and after that to the use of his last Will, and after that to the use of *William* his second sonn in tayle, the Remainder to *Humphrey* his third Son in tayle, the Remainder to *Richard* the fourth Son in tayle, the Remainder to his own right Heires, with power of Revocation, and after makes a Feoffment according to the covenant, and after that purchases eight other acres held of another common person in socage, and after makes revocation of the said Estates of some of the Mannors and Lands which were not held by Knights service, and after that makes his Will, and devises the Land that he had purchased as before, and all the other Land whereof

*Ejectione firme.*

of he had made the Revocation to *Thomas* his eldest son, & the Heirs Males of his body for 500. years, provided that if he alien, and dye without Issue, that then it shall remaine to *William* his second sonne in tayle, with the like proviso as before, and after dyed; and the Jury found, that the Lands whereof no revocation is made, exceeds two parts of all his Lands, *Thomas* the eldest sonne enters the 8. Acres, purchased as before, and dyes without Issue male, having Issue a Daughter, of whom this *Defendant* claimes these eight Acres, and the *Plaintiff* claims them by *William* the second Son.

*Dodridge.*

And *Dodridge* the Kings Serjeant argued for the *Plaintiff*, intending that the sole question is for the 8. acres purchased; and if the devise of that be good or not by the *Statute* of 34. H. 8. And to that the point is only, a man which hath Lands held in cheife by Knights service, and other Lands held of a common person in Socage, conveys by act executed in his life time, more then two parts, and after purchases other Lands, and devises those, if the devise be good or not. And it seems to him that the devise is good, and he saith, that it hath been adjudged in the selfe same case, and between the same parties, And this Judgment hath been affirmed by writ of Error, and the devise to *Thomas*, and the Heirs males of his body for 500. years, was a good estate tayle, and for that he would not dispute it against these two Judgments. But to the other question hee intended that the devise was good, and that the Devisor was not well able to doe it by the *Statute* of 34. H. 8. And hee intended that the *statute* authoriseth two things. 1. To execute estates in the life time of the party for advancement of his Wife or Children, or payment of his debts, and for that see 14. *Eliz. Dyer*, and that may be done also by the common Law, before the making of this *statute*. But this *statute* restrains to two parts, and for the third part makes the Conveyance voyd as touching the Lord: But the *statute* enables to dispose by Will 2 parts, where he cannot dispose any part by the Common Law, if it be not by special Custome, but the use only was deviseable by the common Law, & this was altered into possession by the *statute* of 27 H. 8. and then cometh the *statute* of 32. and 34. H. 8. and enables to devise the Land which he had at the time of the devise, or which he purchased afterwards, for a third part of this Land should remain which hee had at the time of the devise made; and if a third part of the Land did not remain at the time of the devise made, sufficient should be taken out of that; but if the Devisor purchase other Lands after, hee may those wholly dispose: And for that it was adjudged, *Trin. 26. Eliz.* between *Ive* and *Stacye*, That a man cannot convey two parts of his Lands by act executed in his life time, and devise the third part, or any part so held by Knights service; and also he relyed upon the words of the *Statute*, that is, having Lands held by Knights service, that this shall

shall be intended at the time of the devise, as it was resolved in *Butler & Bakers Case*; That is, that the *statute* implies two things: that is property, and time of property, which ought to be at the time of the devise. But here at the time of the devise, the Devisor was not having of Lands held by Knights service, for of those he was only Tenant for life, and the having intended by the *statute* ought to be reall enjoying, and perfect having, by taking, and not by retaining; though that in *Carrs Case*, cited in *Butler and Bakers Case*, rent extinct be sufficient to make Wardship, yet this is no sufficient having to make a devise void for any part.

Also if the *Statute* extend to all Lands, to be after purchased, the party shall never be in quier, and for that the *Statute* doth not intend Lands which shall be purchased afterwards; for the *Statute* is having, which is in the Present tence, and not which he shall have, which is in the Future tence; and 4. and 5. P. and M. 158. *Dyer* 35. A man seised of Socage Lands, assures that to his Wife in joynture, and 8. years after purchases Lands held in cheife by Knights service, and devises two parts of that, and agreed that the Queen shall not have any part of the land conveyed for Joynture, for this was conveyed before the purchase of the other, which agrees with the principall case, and though to the Question, what had the Devisor; It was having of Lands held in *Capite*, insomuch that he had Fee-simple expectant upon all the estates tayle; he intended that this is no having within the *Statute*, but that the *Statute* intend such having, of which profit ariseth, and out of which the K. or other Lord may be answered, by the receipt of the profits, which cannot be by him which hath fee-simple expectant upon an estate tayle, of which no Rent is reserved: and also the estate tayle by intendment shall have continuance till the end of the world: and 40. *Edw* 3. 37. b. in *rationabili parte bonorum*, it was pleaded, that the Plaintiff had reversion descended from his Father, and so hath received advancement. And it seems that was no plea, in so much that the reversion depends upon an estate tayle, and upon which no Rent was reserved, and so no advancement. So of a conveyance within this *Statute*, ought such advancement to the youngest sonne, which continues, as it is agreed in *Binghams Case*, 2 *Coke*, that if a man convey lands to his youngest sonne, and he convey that over to a stranger in the life time of his father for good consideration, and after the Father dies, this is now out of the *Statute*; for the advancement ought to be continuing until the death of the Father: And so he saith also it was adjudged in *Butler and Bakers Case*; that if a man devise Socage Lands, and after sell to a stranger for good consideration, his Lands held by Knights service, this devise is now good for all, for hee hath not any Land held by Knights service at the time of his death, and so he concluded that the

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devise

Houghton.

devile was good, and prayed Judgement for the *Plaintiff*. *Houghton* Serjeant for the *Defendant*, he thought the contrary, and hee argued that before the statutes of 32. and 34. of H. 8. men were disabled to devise any Land, and for that they cannot provide for their Wives, Children, or for payment of their Debts, and for remedy to that, Feoffments to uses were invented, and then to dispose the use by their Wills: and then experience shews that to be inconvenient, and then the statute of 27. H. 8. transfers the use into possession, and then neither use nor land was deviseable without speciall Custome, and then this was found to be mischeivous, after five yeats experience, and then was the statute of 32. H. 8. made, and where by the statute of *Marlebridge*, of those which did enfeof their begotten sons, a Feoffment by the Father to his son and Heir was void for all. Now by this statute this is good for 2. parts, and void only for the 3d part, & that for the good of the Lord; but as to the party that is good for all, as it is agreed in *Nights case*, 8 *Coke*. Then to consider in the case here, if all things concur that the statute requires; and to that here is a person which was actually seised of Land held by Knights service in 12. *Elix.* So that it is a person which then was having within the statute. 2. If here be such conveyance for advancement of his children, as is intended within the statute; and to that he seemed that so, notwithstanding that it may be objected, that here is no execution to the youngest children, inasmuch that it is first limited to such Farmers and Tenants, &c. But he intended that this is no impediment. Secondly, also there is a limitation to the use of his last Will. Thirdly, also there is a limitation to the use of such persons to whom he devises any estate by his Will. But these are no impediments, for the last is no other but a devise to himselfe and his heirs, and there is not any other person knowne, but meerey contingent, and it is not like to a remainder limited to the right heirs of *I. S.* for there the remainder is in Abeyance, but here it is only in contingency, and nothing executed in Interest, till the contingency happen, and the not having of a son at the time shall not make difference, as in 38. *Edw. 3. 26. in formodon* in Remainder, where the gift was in one for life, the remainder to another in taylor, remainder in fee to another stranger; and he in remainder in taylor dyes without Issue in the life time of the Tenant for life, he in remainder in fee may have *formodon* in remainder without mentioning the remainder in taylor. But here he intends that the devise shall be void in respect of the Lands first conveyed, which were held in cheife by Knight service; for the words of the statute are by act executed, either by devise, or by any of them, and they are conjoynd: and it is not of necessity that the time of the Conveyance shall be respected, but the time of the value. And notwithstanding that the Testator doth not mention any time; But in so much as the provision



provision of the *Statute* is to save primor, seisin, and livery to the King, as if the man had 20 l. by year in Socage, and one acre in cheife, and makes a conveyance of all that, it shall be void first to the livery, and primor seisin to the third part: So if he make conveyance of the 20 l. by yeare, and leave the said acre held in cheife to discend, and after that purchase other Lands to the va'ue of the third part of all the conveyance of the 20 l. land, notwithstanding which, for the advancement of his Wife, Children, or payment of his Debts, for he had a full third part at the time of his death, which discended. And he supposed that the having of a dry reversion depending upon the estate tail, is sufficient, having within the words and letter of the *Statute*, and yet he agreed the case put in *Butler* and *Bakers* case; that if a man devise his Socage Lands, and after alien his Lands held in cheife by Knight service to a stranger, *bona fide*, this is good. So if he had made a reservation of his Lands held in cheife to himselfe for his life, in so much that his estate in that ended with his life, and hee remembered the case cyted in *Bret* and *Rigdens* case, Comment. That if a man devise a Mannor in which he hath nothing, and after hee purchaseth it, and dyes, the devise is good, if it be by expresse name. But when a man hath disposed of two parts of his Land, the *Statute* doth not imble him to devise the Residue; but he hath done all, and executed all the authority which the *Statute* hath given to him. But he agreed also, that the reversion is not such a thing of value, which might make the third part discend to the Heir; but it is uncertaine, as a hundred, and the other things of uncertain value contained in *Butler* and *Bakers* Case. And also he intended, that the remainder could not take effect, insomuch that the condition is precedent, and it is not found that the eldest Sonne hath aliened, and then dead without Heir male, and so he concluded, and prayed Judgment for the *Defendant*.

In *Replevin* the *Defendant* avows for 9 s. Rent, the *Plaintiff* pleads a Deed of feoffment of the same Land made before the *Statute* of (*quia emptores terrarum*) by which 6 s. 8 d. is only reserved, and demands Judgment, if he shall be received to demand more then is reserved by the Deed; See 4 *Ed.* 2. Avowry, 202. 10. *H.* 7. 20. *Ed.* 4. 7. *Edw.* 4. *Lung*, 5 *Ed.* 4. 22 *H.* 6. 50. This Deed was without date, and it was averred that it was made before the *Statute* of (*quia emptores terrarum*) which was made in the 18. of *Edw.* 1. And also it ought to be averred to be made after the beginning of the Reign of *Richard* 1. For a writing after the beginning of his Reign checks prescription. But if a man hath a thing by grant before that, he may claim by prescription, for hee cannot plead the grant, insomuch it is before time of memory, and a Jury cannot take notice of that, and for that the pleading before with the said averments was good.

If debt be due by Obligation, and another debt be due by the same

*Replevin,*  
*Grant without*  
*date.*

*Obligation.*

Debtor,



Debtor to the same Debtee of equall summe, and the Debtor pay one sum generally, this shall be intended payment upon the Obligation.

*Earl of Cumberland and Hilton*

*Accompt.*

**I**N an action of Accompt, the (*Venire facias*) was returned by the Coroners; (The execution of this Writ doth appeare in a certaine Pannell fixed to this Writ) and the Pannell and names of the Jurors between the Earl of Cumberland, Plaintiff, and Thomas Hilton Defendant, in a plea of Debt, where it ought to be in a plea of Accompt, and yet after *Verdict* day was given to the Coroners, to amend their Return, which was done accordingly.

*Michaelmas, 1611. 9. Jacobi, in the Common Bench.*

*Ferdinando Crosse, Informer, against Westwood.*

*Information.*

**I**N Information upon the Statute of 5. Ed. 6. Chap. 14. exhibited by Crosse against Westwood, for that the Defendant had bought in grofs, and gotten into his hands by buying, and not by Lease, 40. quarters of Wheat meale, price of every quarter 40. shillings, to the intent to put that in water, and after of that being dried again, then of that to make starch, against the form of the said Statute, and so demanded fourscore pounds for the King and himselfe, according to the Statute; and upon this the Defendant demurred in Law, upon the Information this case came in question: And it was argued by Nicholls Serjeant for the Defendant, that there was not any Law. against Ingrossers known, what was ingrossing before the making of this Statute, which declares and describes who shall be an Ingrosser: Then he considered, if the Ingrosser described in the Information, be such an Ingrosser which is intended by the Statute, and he seemed that no, for he said, the Ingrosser contained in the Information, is not one which bought Corn growing in the field, nor Corn, nor dead Victualls, which are the words contained in the Statute; but he is charged for buying of wheat meal, and it seems that that is not within the words of the Statute. Also Ingrosser intended within the Statute, ought to buy that, to sell the same againe, and so is not the Ingrosser in the Information charged, and if he be not within the words, he shall not be within the punishment; for it is a penall law, and shall not be taken by equity, and so much the more, because it inflicts corporall punishment upon the Offender. And then to consider the words of the Statute, he supposed that Wheat meale is not within the words, Corn growing, nor Corn; but the question is, if it be within the words, dead Victualls: and to that he said, that it hath been adjudged, that a Costermonger which buys

buyes Apples to sell againe, is not within the words (dead Victualls) and he said, that Flower and Meale are things of which Victualls are made, and not Victualls themselves. But there ought to be another thing done to them by the industry of man to make them Victualls; As if a Baker buy Wheat, and make that into Bread, this is out of the provision of the Law, and not aided by the Proviso, which provides for *Fish-monger*, *Poulter*, and *Butcher*, which buyes such things which concern their *Faculty*, *Crafte*, or *Mystery*, if it be not by fore-stalling, but this doth not extend to all *Crafts*. But hee supposed that when the nature is altered, that is out of the purviewe, and is another thing, and shall not be eplevied, notwithstanding that *Replevin* lyeth of Sow and Piggs, where the Sow only was imparked, but not of Leather made in Shoos. Also he seemed that the *Defendant* is not charged that he had an intent to sell the same again: And if a man buy Corne for the provision of his house, this is out of the *Statute*, notwithstanding that it be by Ingrossing. And so if a man buy Barley, and make that into *Malt*, and sell it again in *Malt*: Or if a man buy *Oates*, and convert that into *Oatmeale*, or other Flower, and then sell it again, this is out of the *statute*: and if so it be, then upon this he inferred, that this is not so much as if he had sold that afterwards, when he had altered it in nature, as in making of *Wheat-meale* into *starch*; for in the cases before cyted, things bought are of another nature: So if a man hath many Farms or Grounds sowed with Corn, and he sells them to another, this is no fore-stalling within the *statute*, if it be not driving to *Market*: and he saith, that *Regrater* is defyned by the *statute*, to be him which buyes in one *Market*, and sells that in another *Market* within four miles, and he is an *Ingrosser*, and *Regrater* also: So if a man buy *Wheat*, and makes Cakes of that, this is out of the *statute*: Or if a *Merchant* buy Corn beyond Sea, and sell that here, this is out of the *statute*, for it ought to be bought and sold also within the Realm; so if Corn reserved for Rent be sold again, this is out of the *statute*, and so concluded; First, that the buying of *Wheat-meale* is not buying of Corn growing. Corn, nor dead Victualls, and the sale of that in starch, is not the sale of the same thing again, and prayed Judgment for the *Defendant*.

*Dodridge* Serjeant of the King, for the King, and the Informer supposed the contrary, and to him it seemed, that there are three things considerable, upon the *Statute*: That is, the Scope, the Letter, and the offence, and to the offence, he intended that it is the offence which is contained in the Information which is provided to be punished by the *Statute*, and he said that the offence is confessed by the Demurrer: And he said there were divers good Lawes against Ingrossers before the making of this *Statute*: But it was not defined who was an Ingrosser, and this was the Evasion that:

*Dodridge*

that such Malefactors escaped without punishment. And he said, there are three notable Enemies to the Common Wealth, first Fore-stallers, secondly Regraters, thirdly Ingrossers: And forestaller is he which prevents the Sale in open markett, Ingrosser is he which ingrosseth in his hands, and Regrater is he which sells againe, and he which will be an Ingrosser, will be a Forestaller also, and so of the contrary, and these offences make Dearth, and for that their gaine is called a (wicked gaine:) See the *Statute of 31. Ed. 1. Rastall Forefallers* 1. And they are basely to be esteemed, which marchandise of Marchants, because they cannot gaine unlesse at least they lye: And this Statute hath given a livery to those Malefactors by which they may be knowne, for he hath them described and defined, and this is the scope of the *Statute*; thirdly he considered the Letter, and for the better intelligence of that he considered the Body and *Proviso* of the Statute, and tie himselfe to an Ingrosser, and would not meddle with the other offences contained in the Statute, the words of which are, whatsoever person or persons shall ingrosse or get into his or their hands by buying, &c. (other then by Lease, &c.) and Corne growing in the feilds, or any other Corne or graine, &c. or other dead victualls whatsoever, shall be accepted, reputed, and taken an unlawfull ingrosser, &c. And it hath been objected that it is a penall Statute, and for that shall not be taken by equity, and also is declaratory, and for reason also shall be taken strictly: But he supposed, that admitting that the offender contained in the information be out of the Letter of the *Statute*, that yet he shall be within the equity, and that the *Statute* shall be taken by equity, but he intended first, what was within the Letter of the Statute, for Wheat made into meale is Wheat, and Barley made into Malt is Barley, and so it is contained in the information, that is, that he hath bought Wheat made into Meal, and allowing that Corn is victuall, then *a fortiori*, meale is dead victuall, for it is a degree neerer to the use of man and to sustenance; and by the same reason that it is not victuall, insomuch that another thing ought to be made to it, before it may be used, by the same reason flesh shall be no victuall, for that ought to be boyled or roasted, which is another thing also before it can be used: and he said that meal is the staffe of sustenance, and of all dearths, the dearth of Meale and Corne is the most greatest, and he which wants bread, wants all other victualls, for all others without this breeds diseases, and for that Corne is the victuall of victualls, and so he supposed this remaines Corne, and admitting that not yet it is within the words (dead victualls) Also he intendes that the Statute shall be taken by equity, notwithstanding it be penall, insomuch that it is for publicke good, as the Statute of 25. Ed. 3. of petty treason, contains

taines the Master only : And yet if a Servant kills his Mistris , that shall betaken within the *Statute* : And so if the Servant kills his Master after that he is departed out of his service , upon malice conceived during the time that he was in his service , this shall be also within the *Statute* , and yet is not within the words of the *statute* , and so of the *statutes* of 13. and 27. *Eliz.* of fraud upon taking by equity , and yet all these *statutes* are penall : But insomuch that they are made for the publicke good , and for punishment of offences which tend to the contrary , they shall be out of the generall rule ; But he intended that the same thing which was bought was sold againe , for it is confessed by the information , that he hath sold Mea'e , and it was not the thing that was first bought , and if it were sustenance before that the water was put to it , the putting of water to it doth not make alteration , and is contained in the information , that the Defendant sold the same meale that he had bought by the name of Starch , and this is confessed by the Demurrer , and by that if meale be victuall , then he hath sold meale victuall by the name of Starch , and to the objection , that it is not the same thing , insomuch that the Replevin doth not lie , for the meale after that is made in Starch , he saith Replevin doth not lie for the Corne it selfe if it be not in bags , and if the meale were in bags , notwithstanding that water were put to it , yet Replevin lies , and it is reason that this shall have a large and beneficiall construction , insomuch as it apperes by the preamble , that this is made against the Catterpillers of the Common Wealth : And to the objection that the Statute is Declaratory , and for that it shall not be taken by equity , if this rule shall be observed , then all the questions in the Court of Wards , and in *Butler and Bakers Case* 3. *Coke* they have been in vaine . And yet it appeares that equity was there taken for equity : But in these cases the exposition may be besides , but not contrary to the words , and also he intended that the *Proviso* expounds the Body of the *statute* , and by the *Proviso* it appeares , that the buying of barley and converting it into Malt , and the Sale of that afterwards , and the buying of Oates and the converting of that into Oate-Meale , and the sale of that afterwards should be within the *Statute* , if it had not been excepted by the *Proviso* ; and yet there is an alteration of the thing which is bought : And if a man buy Barley by forestalling , and make that in Malt , and then sell that againe , this is within the *Statute* , and there is no difference betwixt this Case and Malt , for the Barley is put into water and dryed againe , and so it is here , the Meale is put in water and dryed againe , and yet that is within the *Statute* : And the manner and nature of offence , every one which hath a Household and Family knowes , for the finest Wheate Meale makes sustenance for the Master of the Family , and the other makes



makes severall sorts for the residue of the Family, and the Brann makes Bread for Horses; so that the vertue of that is, that it feeds both Man and Beast, and all this is prevented by making that new devised vanity, and the quantity of Wheat which is imployed is incredible, and may feed many, and if the makers of that have gained the name of an occupation, this is worse, for this furthers vanity, and takes away the sustenance of many, and inbanceth the price of Wheate, and is so new an invention that there is not a Latine word for it, and so he concluded that he is an Offender, and within the scope of the letter of the Law, and that the *Preamble and Proviso* hath been so expounded, and that as to meane occupations, as Tan-ners and such like which bought Hydes and sold them again, and he said that they did them further for the use of man, and made that more apt and fit for use, and without that a man could not use them, but in this Case the Starch-makers further the abuse, and prayed Judgment for the King, and for the Informer.

Haughton.

And at another day this case was argued again by *Haughton* for the *Defendant*, that the *Statute* is penall for forfeiture of Goods, as for coporall punishment, and for that it shall not be taken by Equity, nor by interpretation, but strictly according to the Letter, as in *Reniger and Fogassas case*, *Commentaries* 18. By *Pollard*, it is a principall in Law, that a penall *statute* shall not be taken by Equity, as in the *Statute of Westminster* 1. chapter 35. Gives an attain in reall action, and notwithstanding that perjury be an offence against both the Tables, and in attain it is of necessity that it be perjury in the petty Jury, and yet this doth not extend to personall Actions, 5 *Ed.* 3. 6. 34 *Ed.* 4. 7. 1 *Ed.* 3. 6. Gives attain as well for Damages excessive, as for the principall, and this shall be taken strictly, also as it is sayd by *Fineva*, 14 *H.* 7. 14. a. and in 27 *H.* 6. 8. Generall penall *Statuts* shall be limited to certaine times as the *statute of Westminster* 2. chapt. 11. Which gives power to Auditors which finde accountants in Arrerages, to commit them to prison, but it ought not to be forthwith, and this for the favour of the *Defendants*, and this is the reason also of the Judgment in *Fogassas Case* by the *statute of Agreements*, that every agreement shall be taken within the *statute*, and so the *Statute* of 23 *H.* 6. Provides that the Sheriff shall not let out his County, and 20 *H.* 7. 21. It is agreed that the letting out of a Hundred is not within the *Statute*, and it is also agreed in *Partridges case*, *Com.* 87. that the *statute* of 32 *H.* 8. of buying of Tithes, shall not be taken by Equity, and the reason is there given, inso much that it is a penall Law, and if it be so that the *statute* shall not be taken by Equity he considered if it be within the words, and to that he intended that it is not Corne which is bought, for it is changed into another thing, and also it is not dead



dead Viſtuall, for it is not Viſtuall till another thing is made of it, alſo the ſame thing that was bought ought to be ſold again, or otherwiſe it ſhall not be within the Words of the *ſtatute*, and by conſequence out of the penalty, as if a man buy Corn, and make that into Meale, Bread, or Puddings, this is not within the *ſtatute*, ſo the buying of Apples and ſelling of them again, it is no viſtualls within the *ſtatute*, ſo Butcher which buyes Cattell, and thoſe kill and ſells again is not within the *ſtatute*, and he ſayes that Starch is good Food when it is dry again, which proves that this is another thing then the Meale which was bought, and ſo out of the Letter of the *ſtatute*, and to the *Proviſo* which excepts Barley that is bought and made in Malt, and Oates, made in Oate-Meale and ſold again, it ſeems that this is an idle *Proviſo* and ſurpluſage, as in *Porters Caſe*, 1 *Coke* 24.6. in the *ſtatute* of 27 H. 8. *Proviſo* to except good uſes out of the *ſtatute*, inables men to deviſe to ſuch uſes, and ſo the *ſtatute* of 5 Ed. 6. chapter 16. the Body of which extends only to Offices, Covenant, Adminiſtration of Juſtice, or the Revenue of the King, as Receiver, Controller, &c. And yet a Keeper of a Park is excepted out of this, more for the ſatisfaction of the ignorant Burgeſſes then for any neceſſity, and ſo he concluded and prayed judgment for the *Defendant*.

*Montague* Serjeant of the King, for the King and for the Informer argued to the contrary, that as to the objection that Coſtermongers are not within the *ſtatute*, he ſayth, that that is a thing of Delicacy, and not viſtualls within the *ſtatute*, but he ſayth it was adjudged in the Exchequer, that the buying of Meale and the ſelling of that again was within this *ſtatute*, and in this caſe the Information is that the *Defendant* had bought Meale and ſold the ſame again by the name of Starch, which is confeſſed by the Demurrer, and for the expoſition of the *ſtatute*, he conſidered the miſcheiſe before the making of that, the remedy which is provided by the *ſtatute*, and the Office of a good Judge, that is to advance the remedy and ſuppreſſe the miſcheiſe, and he intended that this was puniſhable by the Common Law in another forme, as Waſte, notwithstanding as Action doth not ly, yet *Prohibition* lyes at the Common Law, and by the *ſtatute* of 27 Ed. 3. Juſtices in Oyre, ought to inquire of all grievances and oppreſſions to the People, and there cannot be greater grievance or oppreſſion then that is which deprives them of their food, and for that, he is called the Oppreſſer of the Poore, and *Fleta* calls him Woolfe which ought to be hunted from place to place, and 43 *Aſſiſe*. was puniſhed by Fine and Ranſome, and yet then the offence was uncertain, but now it is made certain by defining it by this *ſtatute*, ſo that this is a *ſtatute of Definition only*, and the *ſtatute* of 31. Ed. 1. inflicts the puniſhment, and

to the objection, that it is not the same thing which is sold, which was bought, he said it is the same in intent, for it produceth the same mischeife.

Secondly, It is the same substance, and the same forme, that is the formall substance which gives the being, but not an accidentall forme, and he saith, that if a man have Corne, and another by wrong takes it from him, and doth convert it into Meale, he may take that back again; otherwise of Iron made into an Anvill, but trees made into Timber, and plate altered in fashion, may be taken back again, otherwise if it be converted into Coyne, and so upon the *Statute* of 21 H. 8. If a Servant sells the Goods of his Master, and steal the Money, that is out of the *Statute*, but if the Servant carry Corne to the Mill, and this is converted into Meale, and then the Servant steales it, this is within the *statute*, for this is the same thing, 28 H. 8. A man pleads ( he appearing seised to the same use ) it shall not be intended the same, but such uses, and *Browning and Beeftons* case in the *Comm.* A man is bound to pay twenty pound at *Michaelmas*, and also afterwards to pay twenty pound at the same Feast, and that was intended the same Feast in another year, and not in the same year, so that the word (same) shall not be so precisely taken, but as Patent of the King for making of a thing, of which a man hath made new invention is good; if it be limited for certaintime only, as *Hastings* hath a Patent for making of *Frisado* only, as a thing newly invented by him, but insomuch that this varies only in the form of making of that, and not in substance, the Patent was adjudged voyd, so a Patent made to a Cutler for Gilding, insomuch that this varies only in forme, this was not allowed to be a new invention, so a Patent made to *Johnson* for new casting of Lead, insomuch that that varies only in forme, and not in substance, this agreed with the ancient, this was also void, and if the starch made be another thing then the Meale which was bought, then it ought to be another in nature and quality, but this is not, for starch is used for Victuall in *Spayne* and other Countries, as *Ryce* is used, see 46 *Assse* 8. 27. and he intended that the *Proviso* made that cleer and without question, for there cannot be a difference made between that and Malt, and if Malt had not been within the Body of the Act, this would not be exempted by speciall *Proviso*, and so the *statute* of 25 H. 8. chapter 2. for transportation of Victuall in *Ireland*, except Meale, which proves also that Meale is included within the words, dead Victualls, and which hath been within the Body of the *statute* if it had not been excepted, and to the Objection that it is penal Law, and for that shall have strict opposition, and not by equity, but he saith that this rule failes as to the interest of the Commonwealth, that is, when the Commonwealth is intervenient; and

to the Objection that this is a thing invented after the making of the statute, he answered that, with the case of *Saint-John*, 5 *Coke* 71. b. Which inhibits Hand-Guns, and it is there adjudged that Dags and Stone-Bowes, which are of later Invention shall be within the statute for they are their invention, and their form of the things which are inhibited, and so *Vernons* case, 4 *Coke*, if he to whose use infeofls his Son and Heir, this shall be taken within the statute of *Marlebridge*, and yet he to whose use cannot make a Feoffment; nor uses were not known till many yeares after the making of this statute, and *Baker* furthers the Meale for the use of man, and for that he may sell it in Bread without any punishment, and then he sayd it was the Office of a good Judge to suppress the mischeife, and to advance the remedy as the Lord *Anderson* sayth in *Brownes Case*, 3. *Coke*: And so he concluded and prayed Judgment for the King and the Informer. And note that this case was solemnly argued by all the Justices of this Court, and it was adjudged, that this was ingrossing within the statute by *Warburton*, *Foster*, and *Winch*. But the Lord *Coke* agrued the contrary, *Walmesley* being absent that Terme.

The same question was argued the same Terme in the Exchequer upon an Information there exhibited by one *Collins* an Informer, and it was there argued by *Hitchcocke* of *Lincolnes Inne* for the Defendant, and he argued that the Starch was not the same thing which was bought, no more then if it had been made in Bread, and he cyted the Booke of 5 *H.* 7. 15. 16. Where it is agreed that if a man takes Barley and makes Malt of that, that he from whom it was taken, could not take the Malt, for that, that there the thing is altered in another nature, and he intended that the Starch is not the same in number nor quality, but he agreed, that if wheat be only grownd, that this notwithstanding is within the Statute, but if it be made into Bread, then sold, it is not within the Statute, for then it is another Body, and other things added to it, and the forme is also altered, and the forme gives the being and the name, and if Water be turned into Wine, it is no Water, though it be by miracle; so if a Parson be made Bishop, he is not the same person, for Honours change Manners, and this is his reason that the Writ shall abate, for it is newly created, as of nothing. 7 *H.* 6. 15. 22 *R.* 2. *Bre.* 93. b. 2 *R.* 3. 20. Also the Statute of 21 *H.* 8. Which provides that the party from whom any Goods are stolne, after that the Felon is indicted, shall have restitution of the same goods, but if Corn be stolne, and converted into Meale, the Owner shall not have restitution, for it is not the same which was stolne, but if Plate be stolne and altered in other forme, yet the owner shall have restitution of that as he sayd, which was adjudged for the King.

40. *Eliz.* But where restitution upon a Writ of Errour, where the Judgment is the same thing shall be restored, that if yet tearm be sold by *fieri facias*, and after the Judgment is reversed by Errour, he shall not be restored to the Tearm but shall have the money for which it is sold, also he saith it is not the same in number and substance, for the 1. thing was corrupt, and the corruption of that was the beginning of the new, and the Wheate is the matter of which, and also Water is, and fire and the heat of the Sun, and after that it is made in Starch, it will not be dissolved and made into victuall, no more then Bread, and the worst Wheat will make the best starch, also he intended, that it is not in the same condition nor similitude, also he objected that (*Ligamen*) which is the word contained in the Count, is no Latine word at all, but (*Legumen*) is the latine word, and that is latine for *Pulse*, and that not being any latine word, the english which is added will not help it, and so he concluded and prayed Judgment for the Defendant.

*Dodridge.*

*Dodridge the Kings Serjeant for the King and for the Informer*, argued that the starch is the same (*Numero*) in number, quality, and substance, not in likenesse, and that the *statute*, is no law of explanation but of *disfnition* of three severalls, which make dearth without want, and the fore-stalling prevented the punishment of Law before the making of *this Statute*; but now these are in severall degrees, that is forestalling is commonly ingrossing and regrating, and Ingrosser is alwayes Regrator, and that the Defendant in this case is Ingrosser of Victualls, that is victualls which is the staffe of mans health, and the want of that is more greivous then the want of all other things, and the dearth of that is the most pinching dearth which may be, and the gain of that is a base gain, and they which basely buy of Merchants that they may straightways sell not any thing unless they may get great gains or save in the measure, & they are called *Regrators*, as *Grators* of the faces of the People, and if this *Statute* had been executed, this had prevented many Dearth, and to the objection, that it is a penall Law, and for that shall be taken strictly, and there is a generall rule, and as true as it is generall, but it is true if it be not within the exception, that is, if publick good doth not intervene, and here it concerns the *Common-Wealth*, as much as the lives of men, and many other penall *Statutes* have been taken by Equity, as the *Statute* which makes that to be *petty Treason* if the Servant kill his Master, and in the 19. *H. 6.* It is agreed that if the Servant after he is departed out of the service of his Master kill him upon any malice conceived during the time that he was in his Service, this shall be taken within the Equity of the *Statute*, and so the *statute* of 33 *H. 8.* Was made precisely, against Hand-Guns and Daggs, are taken to be within the Equity of



of that, notwithstanding that they were invented after the making of that *Statute*, and were not known at the time of the making of that, for they are the same in intention, as it is resolved in *Streches Case*, in *Coke* 71. b. And to the words of the *Statute* (who shall sell the same) it intends that starch is the same in all, but only in similitude; for a thing which is of the same similitude is not the same, but like the same (for no like is the same.) Also he intended that it is the same both in number and form, and he agreed (that forme gave the being) for that is not the accidentall as here it is, but it is the substantiall forme, and every one knows that Meale of Wheat, is the same as Pepper beaten in a Morter, and Pepper and all other Spices, so that it is the same in number, existence, substance, and essence, and he intended also the same in intention, for Meale is Victuall, and is dead Victuall, be it Corne or Meale; and Corn grownd, and made in Meale, then sold, yet that remains dead Victuall, and Meale is the same dead Victuall, though that it be not the same Corne; and to prove that Corn is Victuall, he cyted the *Statute* of 25 *Edw.* 3. 5. *Stat. Chap.* 7. Which provides that no Forrester shall make any gathering of Victualls by colour of their Office; and hee intended, that Corne was within this *statute*, and so also of the *statute* of the 3. *P.* and *M. Chap.* 15. *Rassal*, Universities which provides, that to the Purveyor, Bargainor for any Victualls within 5 miles of any of the Universities of *Oxford* or *Cambridge*, where Grain and Victuall are joyned together.

So the *Statute* of 25 *H.* 8. *Chap.* 2. abridged by *Rassal*, Victuall, 15. which inhibits the transportation of Victuall, if it be not of *Meal* and *Butter* into *Ireland*, by which it appears that *Meale* is dead Victualls: And he said, that Victualls is that which refresheth men, and Victualls are those things, which to the use of eating and drinking are necessary. So that *Meale* is the same in number, though that the *Corne* were turned into *Meale*. And he cyted *Peacock* and *Reynolds Case* to be adjdged 42 *Eliz.* That if a man buy *Corne*, and convert that into *Meale*, and so sell it, it is within this *Statute*: And hee said, that if a man be made a Knight, hanging his action, that this shall abate his action, but yet he remains the same person, but his name is changed, which is the cause of the abatement of his action, 7 *El.* 6. 15. Also the *Defendant* is concluded by his demurrer upon the *Information*, to say that it is not the same thing, for this is confessed by the *Demurrer*; and though that the name be changed, this is not materiall, if the substance be the same; and he agreed, that a Baker which buys *wheat*, and makes it into *Bread*, is not within the *Statute*, for he furthers that to the use of man, as a Curryer makes the *Leather* more fit and apt for use; but so doth not he which makes it into starch, for he furthers the abuse; for it is no lawfull Occupation,



tion, but idle and frivolous furtherance of vanity of men. And in 35. H. 6. 2. If a man enter into the Land of another man, and cut Trees, and that square, and make into Boards, yet if the Owner enter, hee may take them: But if it be made into a House, otherwise it is, for there it is mingled with other things, as it is 5 H. 7. 15. 16. So Iron made in Anvill; But of Leather made in Shooes otherwise it is, inso-much that it is mingled with other things, 12 H. 8. 11. 4. A dead Stag is not a Stag, but is a certain dead thing, and flesh. As a man dead is not a man; but agreed the Book of H. 7. 15. and 16. That Corne converted into Meale cannot be restored, nor reprized, no more may that if it remains in Corne, if it be not in Baggs; And hee said, that upon the Statute of Merton, the Re-disseisin after the Recovery in Assise, if the same Disseisor makes Re-disseisin, the Sheriffe may examine that, &c. And it is agreed in 27 H. 6. That if Tenant in tayle be disseised, and recover in assise, and is put in possession, and after his Estate is altered, and he become Tenant in tayle after possibility of Issue extinct, and then the Disseisor makes Re-disseisin, that this is aided by the Statute, not that it is alteration of the Estate: And also he saith, it appears more fully by the Proviso, by which it is provided, that Barley turned into Malt, and Oates turned into Oat-meale, if it be by Ingrossing, it is within the purview of the Statute. So if it be by way of Fore-stalling; or if they sell them again before that they are converted, shall be Regrators; And to the Objection, that other things; that is, Water and Fire are added to that, he saith that none of them remains; for the Fire dries the water, and the fire also goeth out, and so he concluded and prayed Judgment for the King, and the Informer, and it was adjourned.

*Michaelmas, 1611. 9. Jacobi, in the Common Bench.*

Dower.

**I**N Dower against Infant which makes default upon the grand Cape returned, and agreed by all the Justices, that Judgment shall be given upon the Default, for the Infant shall not have his age, and so it was adjudged upon a Writ of Error.

*Charnock against Currey, Administrator of Allen.*

Debt against  
Administrator.

**I**N debt upon an Obligation against the Defendant, as Administrator as above, he pleads Judgment had against him in an action of debt, and over that hath not to satisfy, to which the Plaintiff replies, that this Judgment was for penalty, and the condition was for a lesser sum; and that the Plaintiff in the first action had accepted his due debt, and had promised to acknowledg satisfaction of the Judgment at the request of the Defendant, and at his charges: and the Admini-  
strator

strator which was the *Defendant*, did not make request upon fraud and Covin, to avoid the *Plaintiffs* action: Upon which the *Defendant* hath demurred, and so confesseth the matter of the Plea. But *Foster* seemed that the *Plaintiff* ought to aver, that the *Plaintiff* in the first action hath offered to acknowledg satisfaction, and that otherwise he should be put to his action upon the Case; but *Coke* and *Warberton* intended that the *Replication* is very good without such averment; for it shall be intended, that the *Plaintiff* will perform his promise: But further, this Demurrer which was only for part, was also for another part, an Issue joyned for the other part, which was to be tryed by the Country; and which shall be tryed of the Issue, or of the Demurrer, was the question; and it was agreed by them all, that the Issue, or Demurrer shall be first at the discretion of the Court, see 11 H. 4. 5. 38. Ed. 3.

Commission is granted to the Councell in *Wales*, of which the *President*, *Vice-president*, or *Cheife Justice* to be one; And the question was, if they might make a *Deputy*, and it was agreed that a delegate power could not be delegated, but they might make an Officer to take an accompt in any such act.

Commission to  
the Councell in  
Wales.

Note that a *Caveat* was entred with a *Bishop*, that he should not admit any without giving notice, that the admission, this notwithstanding is good; but if he admit one which hath no right, he is a disturber, but otherwise the *Caveat* doth nothing, but only to make the *Bishop* carefull what person he admits.

Caveat to a  
Bishop.

*Foster Justice* seemed, that if the Ordinary now after the *Statute* of 21 H. 8. grants administration to one which is next of Blood, that he cannot repeale it; but *Coke cheife Justice* seemed the contrary, and that he incurred the penalty of the *Statute* only. And if an *Administration* be granted to one which is next of Blood, upon which the first *Administrator* brings an action of debt, & hanging that, upon suggestion that the first *Administration* is void, another *Administration* is granted; and it seems that this second *Administration* granted upon this suggestion shall be repealed from the first, though it be generall, and without any recitall of it. But if the second be declared by sentence to be void from the beginning, then the first remains good.

If administration  
on to the next  
of blood cannot  
be repealed.

Action upon the Case was brought for these words, that is, *thou hast killed I. S.* And it seems that the action doth not lye; for a man may kill another in execution, and as Minister of Justice, or in Warr, in which things killing is justifiable.

Action for  
words.

Michael.

*Michaelmasse 1611. 9. Jacobi, in the Common Bench:*

*George Barney against Thomas Hardingham.*

*Trespasse for  
breaking a  
House and ta-  
king a Cow.*

*Houghton.*

**I**N Trespasse for breaking the House, and taking of a Cowe, the Defendant pleades that the King and all those whose Estates he hath in the hundred, have had Turne, and at the Court held such a day it was presented, that the Plaintiff hath incroached upon the high Way, for which he was amerced, and the amercement was affirmed by two Justices of peace, according to the Custome of the Turne aforesaid: And that he being Bayliff of the hundred, by vertue of a Warrant to him in due manner made and directed, hath entred the said house, and taken the said Cowe for distresse, for the said amercement, and carrying it away, which is the same Trespasse, and so demands Judgement, upon which Plea the Plaintiff Demurred: And by *Houghton* Serjeant for the Plaintiff, the Plea in Barr is not good, and first he conceived that it was not good, inasomuch that the King hath made his Prescription by whose Estate, and he intended that he could not make his Prescription by whose Estate, inasomuch that this lies in grant, as it is 12. H. 7. 15. where it is agreed that by nothing which lieth in grant, a man may Prescribe, (by whose Estate.) Also the Plea is that the King was seised in his Demesne as of Fee, where it ought to be in Fee only, inasomuch that it is a thing only in Jurisdiction or Signiory and not Manurable, as in 8. H. 7. 7. H. 4. 30. *assise*. In an Action of Debt upon Reservation made upon Lease of a Mannor and hundred, it is agreed that the hundred is not in Demesne nor Manurable: Also the Plea is not good, inasomuch that it is not Pleaded, before whom the Turne shall be held: And allwaies when a man claimes a Court by Patent, he ought to shew before whom his Court shall be held, otherwise it shall not be good, so of Conufance of Pleas, otherwise it is if it be in a Turne, for that shall be intended a certaine ancient Court. See 44. Ed 5. 17. 1. H. 4. 6. 6. H. 4. 1. Also the Statute of *Magna Charta*, chap. 35. requires that it should be held in the accustomed place, and so it ought to be alledged, or otherwise it is against the Statute, and for that it shall not be good, for it is of the nature of Sheriffs Turne and derived out of that: See the book of Entries in *Replevin* 2. Also the Statute of *Magna Charta*, chap. 14. appoints that the officers shall be the Sheriffe, and this is not pleaded but generally by two Justices of Peace upon their Oath: And also it is not pleaded to what Sum the amercement was made. Also it is pleaded that he being a Bayliffe of the Hundred, by vertue of a Warrant to him in due manner directed and made, hath

hath taken the distresse, and doth not plead the Warrant certainly nor the place where it was made, And for that the Plea is not good: Also he pleades that he took and led away the Cowe, in name of distresse, and he ought to say that he took it and impounded it, for that (he tooke it and carried it away,) imports that he tooke it to his owne use, 9. *Ed.* 4. 2. 20. *Ed.* 4. 6. And so he concluded that the Barr is not good, and praied Judgement for the Plaintiff: And *Barker* (Serjeant for the Defendant) conceived that the Prescription for the Hundred (by which the Estate) was very good, and for that, See 12. *H.* 7. 17. a. 8. *H.* 7. 13. *H.* 7. Also he intended that the title to the Court is very good, notwithstanding that it is expressed, before that it shall be held, insomuch that the Law takes notice of the Turne of the Sheriffe, and that he is Judge of that, and that the Affirance is very good, insomuch that this is according to the Custome of the Turne aforesaid: And the Warrant of the Baylife is very well pleaded, and more is pleaded then need, for it is the duty and appertaineth to his office to gather the amercements, and he might do that without Warrant by force of his office: But if it be upon plaint between party and party, otherwise it is, and for that see the book of Entries 553. And also the charge in the Action is for that, that he took and carried away, and of that he made Justification, and he cannot Plead otherwise, and to the (whose Estate, &c.) That a man cannot Prescribe to have a thing by (whose Estate) which lieth meere in grant, without shewing of a Deed, yet when that is appurtenant to another thing, as here the Court is to a Hundred, it may very well that do, and 33. *H.* 8. *B. Leete*, when the penalty is Presented by the Jury it selfe, there needs not any affirance: And so he concluded that the Plea in Barr is very good, and praied Judgement upon that for the Defendant: And *Coke* cheife Justice said, that Turne of the Sheriffe is derived of Turner, which signifies to ride a Circuit, and so of that is derived Turner, and of that the Turne of the Sheriffe, and of this is derived the Hundred, and from this the *Leete*: And it seemes to him, that he ought to plead, before that the Court shall be held, insomuch that it is against Right, and so it was adjourned.

*Barker.**Barr not good.*

*Michaelmas 1611. 9. Jacobi, in the Common Bench.*

*Hill against Upchurch.*

**N**OTE that *Coke* cheife Justice saith, that it was adjudged in 27. of *Eliz.* For the Mannor of Northhall in the County of *Essex*, that admitting that a Copy-hold may be Intailed by the Statute, that then Custome that a surrender shall be a Barr or discontinuance

*Copy-hold intailed.*



tinuance of such Estate tayl is good, for as well as the Estate may be created by Custome, as well it may be Barred or discontinued by Surrender by Custome.

## Brandons Case.

Extent upon  
a Statute.

**N**OTE if a Mannor or other signiory be extended upon a *Statute*, and a Ward falls which is a sufficient value to make satisfaction of the Extent, yet this shall not be any satisfaction in tender to satisfaction: Inasmuch that this is only the fruit of Tenure, and not like to cutting of Trees, nor to digging of Cole or other Ore: And so *Coke* cheife Justice, that it hath been adjudged, and with this agreed the booke of 21. Ed. 3. 1.

Summons in  
Dower

The manner to make Summons in Dower, if the Land lieth in one County, and the Church in another County: Then upon the *Statute* the Sheriffe ought come to the next Church, though it be in another County, and there make Proclamation, as the Auditors in Accompt ought to commit the Accomptants found in arrearages to the next Gaole, and there ought to be committed though that they are in another County.

Patent of a  
Judge of the  
Common bench.

The words of a Patent of a Judge of the Common Bench are as follows, that is to say, *James* by the grace of God, &c. Know that we have constituted *Humphrey Winch* Serjeant at Law, one of our Justices of the Common Bench, during our good pleasure, with all and singular Vales and Fees, to the same office belonging and appertaining, In Witnesse of which, &c.

*Michaelmasse 1611 9. Jacobi, in the Common Bench.*

*Jacob against Stilo. Sowgate.*

Action upon the  
case for slander

**I**N an Action upon the Case for slanderous words: The declaration was, that the Defendant said of the aforesaid Plaintiff, that he is perjured, to which the Defendant pleads, that the Plaintiff another time hath brought an Action in the Kings Bench against the same Defendant for that, that he the said Plaintiff was perjured, and had cozened *John Sowgate*, and that the Defendant had pleaded to all besides these words, (Thou art perjured) not guilty, and to the words (thou art perjured) he Justifies that the Plaintiff was perjured in making an *Affidavit* in the Star-chamber, and this Issue was Joyned, and it was found for the Defendant, but it was not pleaded that any Judgement was given upon it, And *Haughton* Serjeant for the Plaintiff, which had Demurred upon the Defendants Plea: Argued that the Plea is insufficient, for if it shall be intended

*Haughton.*



ded by that, that the Plaintiff was afore times barred, if it be in a reall Action, it ought to be averred, that it is for the same Land, and if it be in a personall Action it ought to be averred that it is the same Debt or Trespasse, and if it be pleaded by way of Justification, then he ought to have averred also, that the Plaintiff hath taken a false and untrue Oath, upon which Issue might have been taken: But here nothing is pleaded but the Record, and nothing averred (*in Facto*) So that the Issue cannot be taken upon it, for the pleading is only of Record, and that the Defendant for the cause aforesaid in the Record aforesaid mentioned, spoke the said words, and this is not good, for there is not contained any cause of Justification, as in *Quare Impedit*, in the 15. and 16 H. 6. The Defendant pleads that he was Incumbent by the cause aforesaid (and without that: ) But this was no good Plea, for he ought to plead his Title specially. And also it is not pleaded as *Estoppel*, for then he ought to have relied upon that precisely, as 35. H. 6. in *Replevin* the avowant relies upon dissent, 30. *assise*. 32. 2. H. 7. 9. Also *Estoppel* it cannot be, insomuch that Judgement was not given in the first Action; Also it is not pleaded as *Estoppel* for the Plea is concluded Judgement if Action, where he ought to have relied upon the *Estoppel*, and peradventure also the Triall was voyd by unawarding of *Venire Facias*, or other Error; So that without Judgement it can be no *Estoppel*, and so he concluded and praied Judgement for the Plaintiff. *Barker* Serjeant argued for the Defendant, that the Declaration is very good, and notwithstanding that the words are generall; that is, he is perjured, yet this may be supplied very well by the (*Innuendo*) as it appears by *James* and *Alexanders* Case, 4. *Coke*. 17. *a*. And also that *Estoppel* by the Verdict is good without Judgement, as in Action of Debt, release was pleaded, and Issue joyned upon that, and found for the Defendant, and after another Action was brought for the same Debt, and agreed that the first Verdict was *Estoppel*, 2. *Ed.* 3. 19. *b. c.* And he cited *Baxter* and *Styles* Case to be adjudged in the point, that the *Estoppel* is good, and also *Vernons* Case, 4. *Coke* where the bringing of a Writ of Dower, Estopped the Wife to demand her Joynture, and so concluded and prayed Judgement for the Defendant: *Coke*, the Count is good being of the aforesaid Plaintiff, and may after be supplied by (*Innuendo*) though that the words after are generall; But if the words were generall, that is, He is perjured, without saying that the Defendant spoke of the aforesaid Plaintiff, these English words following (*Videlicet*) he (*Innuendo*) the Plaintiff is perjured, this is not good, and shall not be supplied by (*Innuendo*) and he said that another time convicted is a good Plea in case of life without Judgement, but this is in favour of life, but in trespass

*Barker.**Periured Actionable.*

passe it ought to be averred, that it is the same Trespasse, and also there ought to be Judgment, and the Defendant ought to relye upon that as an Estoppel, and agreed by all that Judgment should be given for the Defendant, if cause be not shewed to the contrary such a day, &c.

*Michaelmas, 1611. 9. Jacobi, in the Common Bench.*

*Hall against Stanley.*

*Trespasse for  
imprisonment.*

*Dodridge.*

**I**N Trespasse for Assault and Imprisonment, the Defendant justifies, inasmuch that the Action upon the case was begun in the *Marshalsey* for a Debt upon an *Assumpsit* made by the Plaintiff, and that upon that *Capias* was awarded to this Defendant being a Minister of the said Court to Arrest the Plaintiff to answer in the said Action, and that he by force of that Arrested the Plaintiff, and him detained till the Plaintiff found suerties to answer to the said Action, which is the same assault and Imprisonment: To which the Plaintiff replied, that none of the parties in the said Action were of the Kings household, and so demanded Judgement, upon which the Defendant Demurred in Law: And *Dodridge* the Kings Serjeant for the Defendant, that the Court of *Marshalsey* may hold Plea of Actions of Trespasse, by the parties or any of them of the Kings house or not, and he intended that the Jurisdiction at the Common Law was generall, and then they have Jurisdiction of all Actions as well reall as personall, and though that their Jurisdiction be in many cases restrained, yet in an Action of Trespasse there is not any restraint, but at this day they have two Jurisdictions: That is, in Criminall cases, and also in Civill causes, within the Virge: See *Fleta* book the second and third, where he describes the Jurisdiction of all Courts, and amongst them the Jurisdictions of this Court, and also *Britton* which wrote in the time of *Ed. 1. lib. 1. chap. 12.* which saith it was held before *Bygott* who was then Earle of *Norfolke* and *Marshall*, and their Authority and Jurisdiction was absolute and their Judgements not reverfable unlesse by Parliament, and this appeares by the *Statute* of *5. Ed. 3. chap. 2.* that they might hold Plea of things which did not concerne them of the household, and also the words of the *Statute of Articuli super chartas chap. 3. 28. Ed. 1.* provides that the *Marshalsey* shall not hold Plea of free hold of covenant, nor of any other contract made between the Kings people, but only of Trespasse made within the Kings house or within the Verge, and of such Contracts and Covenants which one of the house made with another of the house and within the house and in no other place, where Trespasse is Limited to the Kings house

house or within the Virge, but no restraint that the parties shall be of the Kings House, or otherwise it shall not be intended which shall be only those which are of the Kings House, inasmuch that the Trespasse is limited to be made within the Virge, also he sayd it was a *statute* made 30 Ed. 1. which provides, that if any causes arise amongst the Citizens of London only, that this shall be tryed amongst the Citizens; but if it be between them of the House, it shall be tryed by them of the House, by which it appears that they may hold plea between Citizens of London, where none of the parties are of the Kings House, also the *statute* of 6 Ed. 3. chapter 2. provides that in Inquests they shall be there taken by men of the Country adjoining, and not men of the Kings Household if it be not betwixt men of the Kings Household if it be not for Contracts, Covenants and Trespasses made by men of the Kings Household of one part, and that the same House which refers to the *statute* of *Articuli super chartas* before cited, and this expounds, and so the *Statute* of 10 Ed. 3. chapter 2. provides that in Inquests they are to be taken in the *Marshalsey*, that the same inquests shall be taken of men the Country thereabouts, and not by People of the Kings House, if it be not of Covenants, Contracts, or Trespasses made by people of the same House, according to the *Statute* made in time of the Grand-Father of the said now King, and according to that the use hath been, that is, if none of the parties were the Kings house then the tryall had been by the men of the country adjoining. And if one of the parties be of the house, and another not, then the tryall is by party Juries; and if both the parties be of the house, then all the Jury hath used to be of the house; and if the Cause be between Citizens of London, then the tryall hath used to be by Citizens of London, and in the Book of Entries, the same plea was pleaded in false Imprisonment, 9. 10. and the Register, fol. 111. A. in action upon escape in Trespasse, and to the Books of 7 H. 6. 30. 10 H. 6. Long, 5 Ed. 4. 19 Ed. 4. 21 Ed. 4. He saith, that none of these Books are in action of Trespasse but one onely, and that is mistaken in the principall point, and so may be mistaken in one by case: And the Booke of 10 H. 6. 30. is directly in the point; but Brooke in a bridgement of that saith, that the practise and usage of the Court was otherwise. But it may be objected that this is (*Indebitatus assumpsit*) which is in nature of an action of debt, and founded upon contract; he said that Fitzherbert in his *Natura Brevium* said, that there are two sorts of Trespasses, that is, General, and upon the Case, and Trespasse is the *Genus*, and the other are the *Species*, and that the action is founded upon breach of promise, which is the Trespasse, as for not making of a thing, which he hath promised to doe, and it is *Majestale breve*, and not *breve formatum*, and so is an action of

Trover

*Trover* and *Conversion*, or *Assumpsit*, are Writs of Trespasse; but admit that no, yet action of false Imprisonment doth not lye, for hee ought not to dispute the authority of the Court; for the duty of his Office is only to be obedient and diligent, for otherwise he should be judged of the Judge. And who by the appointment of the Judge doth any thing, doth not seem to do it deceitfully, because it is of necessity he should obey; and 14 H. 8. 16. a Justice of Peace awarded a Warrant to arrest a man for suspicion of Felony, where his Warrant was void, and yet the party to whom it was directed, justifies the making of the Arrest by force of that. And 12. H. 7. 14. *Capias* was awarded to the Sheriffe without original, & yet it was a sufficient Warrant to the Sheriffe: and 22 *Affis*. 64. Court awarded a Warrant, where they had no Jurisdiction, and yet it was a sufficient Warrant for him to whom it was directed. And so in *Manfells* case, if the Sheriffe execute an (*habere facias sefinam*) awarded upon a void Judgement, this is a sufficient Warrant for him. So in this case allowing that the Court hath no Jurisdiction, yet the *Plaintiff* cannot be retained by this action, but is put to his Writ of Error, or to his action upon the *Statute*, and so he concluded, and prayed Judgment for the *Defendant*.

Hutton.

Hutton Serjeant for the *Plaintiff* argued to the contrary, and hee intended that Judgment should be given for the *Plaintiff*, for the matter, and also for the Parties, and that the Judgement, and all other proceedings in the Marshalsey were meerly void; and he denied that they had originally such absolute jurisdiction, as *Fleta* pretended, for originally that was only for the preservation of the peace, as it appears by the stile of the Court, and also by the diversities of the Courts, and that Criminall causes which require expedition, are there only tryable, and that civill causes are incroached of later times, and it was necessary to be restrained and reformed by *Parliament*: And it appears by the *Statute* of *Articuli super Chartas*, that they have encroached to hold plea for free-hold; and for that the Court which is mentioned in *Fleta*, cannot be otherwise intended then the Kings Bench, which then followed the Kings Court. And also that they have not incroached only upon matters, as to hold plea for Free-holds, but also to persons and place where Contracts and Trespasses were made, and this was the cause of the making of the said *Statute*. And to this action of Trespasse for *indebitatus assumpsit* there begun, he intended that it is for another thing, of which they could not hold plea, and it might be criminall; for Civill is that which begun by contract, and it is part of the commutative Justice, for which is recompence given by one party to another, and is not founded upon the *Contract*, but is translated to an action of Trespass, which manner of Trespass is not within the *Statute*: and so he intended, that for the matter



matter it is not within the *Statute* : and then for the persons also , he intended that it is not within the *Statute* , and this appears by the words of the *Statute* of 28. *Edw. 1. Articuli super Chartas* , and to that 10. *H. 6. 130.* it is adjudged that Judgement in such case there given is void, and *Coram non Judice*, so 7 *H. 6. 30.* expresses the cause to be , inſomuch that none of the parties are of the houſhold of the King, 4 *H. 6. 8. 19 Edw. 4. 8. 5 Edw. 4. 32 H. 6. Ret. 27.* And he cyted alſo *Michelburns* Caſe to be adjudged upon a Writ of Error, in the Kings Bench , 38 *Eliz.* That they could not tender a Plea in *Traſſaſſe* for *Trover* and *Conversion* , if none of the parties were of the Kings houſe : and further he ſaid , that when a Court hath Jurisdiction, and errs in matter of proceedings, or in Law , there the Execution made by force of their Proceſſ ſhall be lawfull. But where the Judgement is void by default of Jurisdiction, as in this Caſe, there it is otherwiſe, as 10 *H. 6. 13.* Recovery of Land in the Spirituall Court is void; ſo *Formedon* commenced, & Judgment given upon that before the Judges of Aſſiſes void. So 36 *H. 6. 32.* Recovery of Land in *Wales* in this Court is void ; and 8 *Edw. 4. 6.* Recovery of Land in ancient demefne is avoidable by Writ of *Deceit* : But in the other caſes before , the Judgment and Recovery is abſolutely void, and (*Coram non Judice*) for default of Jurisdiction : So in 9 *H. 7. 12. b.* Recovery of Land in *Durham*, *Cheſter*, or *Lancaſter*, here is void for the ſame cauſe : And in this caſe alſo the ſaid *Statute* makes that void by expreſſe words, ſee the *ſtatute* of *Articuli ſuper Chartas* , Chap. 3. And to the caſe of 14 *H. 8.* before cyted , of Warrant awarded by Juſtice of Peace ; he agreed, that inſomuch that the Juſtice of Peace had Jurisdiction of cauſes of Felony, and eſted only in the forme and manner of his proceedings , and ſo in all the other caſes which were put of the other part. And alſo hee agreed that a Writ of Error may be well maintained, if ſuch Judgement which is void, as it was in *Michelburns* caſe, for the party may admit the Judgment to be but voidable if he will. And to the exceptions to the pleading, that is, that the authority is not proſecuted, 1 *Poſtea*, that is, ſuch a day, which was before the Judgment, and yet it ſeems good ; and that in the firſt the authority was very well proſecuted in the 2 *Poſtea* was ſufficient, and the other words, that is, (ſuch a day) is but ſurpluſage ; and ſo he concluded , and prayed Judgment for the *Plaintiff* , and it was adjudged.

*Coram non ju-  
dice.*

*Judgement  
void.*

*Michael.*



*Michaelmas 1611. 9. Jacobi, In the Common Bench.*

*Reto against Checy and Sherman and their Wives.*

*Trin. 9. Jacobi, Rot. 1151.*

**I**N Trespasse and *Ejectione firme*, the Defendants pleaded; that one of the Defendants made agreement with the Plaintiff for the said Trespasse and Ejectment with satisfaction, and demands Judgment, if action, upon which the Plaintiff demurred in Law; and it was argued by Nicholls Serjeant for the Plaintiff, that the agreement was no plea, though it be said by Keble in the 11. H. 7. 13. That though it be a Plea in Ravishment of Ward, *quare Impedit*, and *quare ejecit infra terminum*, inasmuch that they are actions personall: But Wood denied that, inasmuch that Inheritance is to be recovered, and in *Ejectione firme* term shall be recovered; and for that it shall not be spoken, and of this is Wood expressly in the 13. H. 7. 20. b. That in *Ejectione firme* agreement shall not be a plea, inasmuch that the term is to be recovered, which is the thing in demand. And there also it is agreed, that in Waste brought against Lessee for yeares in the *Tenet*, agreement is good plea, and so *Vassalor* intended, if it be in the *Tenet*, but not if it be brought against Lessee for life: And also he intended that by Recovery in *Ejectione firme*, more shall be recovered then the term only, for by that the reversion shall be also reduced, and for that the Inheritance is drawn in question; and it is said in 11. H. 7. 13. that it shall not be a plea in *Assise*, inasmuch that there the Free-hold is to be recovered, and by the same reason hee intended that shall be no plea, inasmuch that more is to be recovered then in *Assise*, for there the Tenant only shall recover the free-hold, and his damages; but here the Term and the Inheritance also are reduced and revested: And this is the reason also which is given in 11. H. 7. 13. b. by Fisher: That if a man make a Lease for yeares, rendering Rent, and after brings Debt for the Rent behind, the Defendant cannot wage his Law, notwithstanding that the action is personall: But this is more high in his nature, as it is there said, and yet there nothing shall be recovered, but only damages, for which a man may have satisfaction. Also he intended that it was not well pleaded; that is, that such agreement was had between the Plaintiff, and one of the Defendants, and betwixt those shall be intended those two only, and also *Ipsam* and *Alios* by his commandment, and doth not shew that this was made by the other two by his commandment, and so he concluded, and prayed Judgment for the Plaintiff.

*Shirley.*

*Shirley* Serjeant for the Defendant, that the Plea is good, and that  
the

the nature of the Action is only Trespasse by force and arms, and differs from a *Quare ejecit*, but *Ejectione firme* differs from *predict. infra terminum*, and lyes against the immediate Ejector; but *Quare ejecit* lyeth against him which hath title, as he in reversion, 7 H. 4. 6. b. *Ejectione firme* was brought by *Executors* of Land let to their Testator for years, upon outring of the Testator by the statute of 4 Edw. 3. cap. 6. which gives action for the *Executors* of goods taken out of the possession of their Testator: and it seems to him also that proces of Outlawry lyes in an *Ejectione firme*, but in *Quare ejecit infra terminum* only summons. So it is 11. H. 7. 13. There is a great difference between Waste and this, for there the Process is Distress, and other speciall Process: But so is it not here, but only the Process which is in other generall actions of *Trespasse*, and so is the expresse opinion of Keble, in 11. H. 7. 13. That in ravishment of Ward, *Quare Impedit*, and *quare ejecit infra terminum*, that agreement is a good plea, and yet all these trench upon the Realty; and in *ejectione firme*, if the term expire, hanging the action, this shall not abate the Writ; but the Plaintiff shall have Judgement for his damages, otherwise in a *Quare ejecit infra terminum*. And it was resolved 20 Eliz. That if an *ejectione firme* be brought at the common Law of Lands in ancient Demesne, that this shall not alter the tenure, inasmuch that it is meerly personall, and the damages are the principall which are to be recovered; and in 21 Edw. 4. 10. b. the difference is shewed between *ejectione firme*, and *quare ejecit infra terminum*, for one lyes against the Lessor, or other Ejector immediately, and the other lyes against the Feoffee of the other immediate Ejector, and the first is by force of armes, and the other nor, and it alwayes lyes against him that is in by Title, and the first against him which is the wrong doer; and hee intended that the agreement with one of these *Defendants* is good, for it is satisfaction, and discharges the action as release, the which every one which hath it may plead; and here it is pleaded with satisfaction, that is obligation, upon which the Plaintiff may have action, and so he concluded and prayed Judgement for the *Defendants*.

Wynch Justice argued this case, notwithstanding that hee had not heard any argument at the Barr, this being the first case that he argued after he was made Justice of this Court, and he delivered his opinion that the agreement was a good Barre; and he said, that the difference is where the thing to be recovered is in the Realty, and where it is in the Personalty, as it is agreed in *Blakes Case*, 6 Coke 43. b. So that here the only question is if this action be in the Realty, or in the Personalty, and it seems to him that it is in the Personalty, and that it is of the nature of Trespass, and the term is not anciently to be recovered, as it is 6. R. 2. Fitz. Na. Bre. and it is within the Sta-

*tute of 4 Edw. 3. Chap. 6.* which gives action to *Executors* for goods carried away in the life time of the *Testator*, as it is *7 H. 4. 6. b.* And to objection, that ancient *Demesne* is a good plea, and for that is in the *Realty*, and hee said, and so it is in *Accomp*, and *Accomp* is not in the *Realty*; and the reason why it shall not be a *Barr* in *Affise*, is in so much, that there the *Free-hold* shall be recovered, but this fails here: so in *Waste* also this toucheth the *Inheritance*; but here the *Inheritance* doth not come in question, but the *tearm* only; and it doth not appeare to the *Court*, that it concerns *Inheritance*, for it may be betwixt the *Lessor* or another which claims under him, and the *Lessee*. And if a *Husband* which hath a *tearm* in right of his *Wife*, submits himself to *Arbitrement*, this shall not bind the *Wife*, but shall bind the *Husband*, and shall be a *Barr*, if the *Wife* hath not *Interest*, and so he concluded that *Judgment* shall be given for the *Defendants*, and that the agreement is a good *Barr*.

Foster.

*Foster* Justice intended that the agreement is a good *Barr* in an *Ejectione firme*, &c. And it seems that it is no question but that the action is *personall*, and yet hee agreed that ancient *Demesne* is a good plea. So in debt, receipt of part hanging the *Writ* abates all the *Writ*. And *21 Ed. 4. 10. b.* Two *Tenants* in *Common* were of a *Tearm*: and *7 H. 4. 6. b.* *Executors* shall have an action upon *Entry* made in the time of their *Testator* by the *statute of 4 Edw. 3. Chap. 6.* and in this the *Plaintiff* shall recover his *Tearm*; but he denied that the *reversion* is reduced by the recovery, nor revested in the *Lessor* till the *Lessee* enter. And to the *Objection* that the *Realty* and *Inheritance* may come in question in this, that is not to the purpose, for so it may in an action of *Trespasse*. And he intended there is no difference between agreement and *Arbitrement*, and agreed that none of those is a plea where the *Inheritance* or *Free-hold* comes in question. And he conceived that *Arbitrement* for *free-hold* is not good, unless the submission be by *Deed* indented; for by *Obligation* with *Condition* is not sufficient, *11 H. 4. 44. b.* and it is not in difference, *14 H. 4.* that in *ravishment of ward* submission may be without *Deed*, in so much as it is in the *personalty*, and he intended that there is no difference between that and *Ravishment of Ward*, and *Ward* is but *Chattell*, so is *tearm* which may be sold by word, as well as the possession may be sold by word, so may the right of that be extinct by word. And as if a man be bound to pay a certain summe of money at a certaine day, and the *Obligee* accept parcell in satisfaction before the day, and that is very good: So in this case acceptance of a summe of lesse value may be a satisfaction of such *personall* thing, *4 H. 8. Dyer 1. 8 Edw. 6. Dyer, 19 H. 6. 9 H. 7.* And so he concluded, that for that nothing is to be recovered but *Chattell*, that for that the agreement shall be good plea.

*Warburton* Justice agreed that the agreement should be good in *Ejectione*

Arbitrement

*Ejectione Firme*, inſomuch that this is meerely perſonall: And he argued that it is no Plea in *aſſiſe* inſomuch that this is reall, and there the Free-hold is to be recovered, and this is the reaſon that waging of Law lieth in Debt upon arbitrement, inſomuch that the ſeale of the Arbitrators is not annexed unto it, and for that to him it is but only matter in Deed, 13. *Ed.* 4. And he intended that agreement with ſatisfaction is as much as Arbitrement, for a perſonall thing cannot be ſatisfaction for a reall thing, and that is the cauſe that it cannot be a Barr in Debt upon arrerages of accompt, inſomuch that that is founded upon Record, and is a thing certaine: And in waſt it is no Plea, inſomuch that this is a mixt Action, if it be againſt a Leſſee for life, otherwiſe if it be againſt a Leſſee for yeares, for a Tearme is taken in 7. *H.* 4. 6. *b.* to be within the word (Goods,) and an Executor may have an Action upon that, (of goods carried a way in the life of the Teſtator) And though that the Entry abate the Writ, yet this doth not prove that it is more then a Tearme, and though that the Tearme determine hanging the Writ, this ſhall not abate the Action, but the Plaintiff ſhall recover Damages; and in Ravishment of Ward, Summons and Severance lies, and the Body of the Heire ſhall be recovered, and ſo in *Quare Impedit* Summons and Severance lies, and the preſentment ſhall be recovered and Damages, and yet the principall is but preſentment, which is but a Chattell, and for that agreement ſhall be a Barr, and ſo he concluded that Judgement ſhall be given for the Defendant, and that the agreement is a good Plea, *Coke* cheife Juſtice agreed that the agreement is a good Plea: & he thought that that ſaved of Realty, for that, that the Tearme is to be recovered, and of the perſonalty in reſpect of the Damages, which are to be recovered, and that in all Actions, where money or Damages are to be recovered, (agreement) is a good Plea, as in 47. *Ed.* 3. 24. and 10. *Ed.* 3. in Debt upon a Leaſe for yeares, concord is a good Plea, and 7. *Ed.* 4. 23. in *Detinue* for charters it is a good Plea, and in 6. *Ed.* 6. *Dyer* 75. 25. it is a poſitive rule, that in all Caſes and Actions, in which nothing but amends is to be recovered in Damages, there an agreement with an execution of that is a good Plea, and for that in *Detinue* it ſhall be a good Barr: So in Covenant it was adjudged in *Blakes Caſe*, 6. *Coke* 43. 6. As where an Obligation is with a Condition, to pay money at ſuch a day, the payment of another thing is good, if the Obligation be to pay a certaine Sum of money: But if a man be bound in a Sum of money, to make another Collaterall thing, the acceptance of an other thing Collaterall ſhall not be a Barr, for money is to the meaſure, and the price of every thing, if a man be bound in two Horſes to pay one, acceptance of another thing ſhall be no Barr: But the acceptance of



such a Sum of money in satisfaction is good Barr, for this is the just Estimation and measure of every thing, see 12. H. 4. Where a man was bound in an Obligation with Condition, that he shall make acknowledgement of the Obligation of twenty pound to the Obligee before such a day, &c. And agreements are much favoured, for it is a *Maxim*. and Interest of the Common-Wealth, that there be an end of suits, for by Concord small things increase, and by Discord great things are consumed, and the beginning of all Fines is, *Et est Cordialis*, &c. and the 11. of Rich. 2. Barr. 242. In Debt upon a Lease for yeares, the Defendant pleads that by the same Deed by which the Land is let, the Plaintiff grants, that the Defendant ought to repaire the houses lett, when they are ruinous, at the costs of the Plaintiff, and he retaines the Rent for the repaire of the houses being ruinous and a good Barr: And if it be a right of Inheritance or Free-hold that cannot be barred or extinct by acceptance of another thing, though it be of other Land, as of another Mannor, as it is agreed in *Vernons Case* 4. of *Coke*: A woman accepts Rent out of the Land of which shee is not Dowable in recompence of her Dower, this shall not be a Barr, 5. Ed. 4. 22. 3. *Eliz. Dyer*, and he said that the book of 11. H. 7. 13. is misprinted, inso much that it is reported to be adjudged: But in truth this was not adjudged, for then it would not lay in 13. H. 7. 20. the residue before 11. H. 7. 13. And in the 16. of H. 7. warranty, it is agreed that in wast against Lessee for yeares. Agreement is a good Plea, otherwise if it be against Lessee for life: And if they have adjudged, 11. H. 7. 15. which was so small a time before, they would not have adjudged the contrary in 16. H. 7. and *Hillary* 6. Ed. 6. *Bendlowes* in wast against Lessee for yeares in the *Tenet*: Agreement is affirmed to be good Barr: And in the book of Reports in the time of H. 7. printed in time of H. 8. the yeare of the 11. of H. 7. there was no print at all: And he then upon that inferrs, that as well as a man might agree for Trees, so well might he agree for Tearme; and to the booke of 9. H. 5. 15. a. That release of one Plaintiff in an Action of wast is a good Barr, he said that this is to be understood in wast of the Tenant, and then it shall be a good Barr, see in the 12. of Ed. 4. 1. a. Two joyne in an Action of wast, and the one was summoned and severed the other recovered the halfe of the place wasted; and in the 26. H. 6. 8. Agreement is a good Barr in an Action of wast, and he intended that in all Actions by force and Armes, where a *Capias* lies at the Common Law: Agreement or Arbitrement are good Pleas, as Ravishment of Ward which is given by *Statute* in lieu of Trespasse, for taking of a Ward, where a *Capias* lies at the Common Law, and Agreement was a Barr, and for that now Agreement shall be a Barr in Ravishment of a Ward: And.



And he intended that an *Ejectione Firme* which is Trespasse in his nature, and the Ejectment is added of later times: And in all their Entries, this is entred Trespasse, and severs the Trespasse from the Ejectment, and the Ejectment will vanish, and the *Statute* of 4. Ed. 3. chap. 6. which gives Action to Executor, of goods carried away in the life time of the Testator, extends to that which proves this to be Trespasse, for by the *Statute* the Executors may have *Ejectione Firme* for Ejectment made to their Testator, notwithstanding that ancient Demesne is a good Plea in that, and in the 44. Ed. 3. 22. That is called an Action of Trespasse, and so all the Entries are *De Placito Transgressionis*, and in the book of Entries, in *Mayhme* it is cited to be adjudged 26. H. 6. Trin. Rot. 27. that concord is a good Plea in an appeale of mayne 35. H. 6. 30. But in an Action in the realty it is no Plea, otherwise in *Quare Impedit*, for there nothing is to be recovered, but that which is personall, and he intended that Agreement by one of the Defendants in personall Action is a good Barr, as in 36. H. 6. Barr, concord made by the freind of one of the parties was a good Barr *Statum*, Covenant accordingly, and 35. H. 6. 7. H. 7. One of the petty Jury in Attaint, pleads agreement and good, and in an *Ejectione Firme*, Lease made to try Title is not within the *Statute* of buying of Titles, if it be not made to great men, but to a Servant of him which hath the Inheritance; and cannot maintaine or countenance the Action, and *Bracton* fol. 220. Lessee for yeares hath three remedies if he be evicted, that is Covenant, *Quare Ejacit infra Terminum* against the Feoffee of the Ejector, or an *Ejectione Firme* against the Immediate Ejectors, and in *Ejectione Firme* the Terme shall be recovered, as 12. H. 4. 1. H. 5. and 11. H. 6. 6. Non-Tenure is a good Plea in *Ejectione Firme*; ergo the Terme shall be recovered, 7. Ed. 4. 6. 13. H. 7. 21 and 14. H. 7. It is adjudged that the Terme shall be recovered in *Ejectione Firme*, and so he concluded, that the agreement shall be a good Barr, because Wise men seeke peace Fooles seeke strifes: And that Judgement shall be given for the Defendant, which was done accordingly.

*M. heelmast*, 1611. 9. Jacobi, in the Common Bench.

Mallet, against Mallet.

**L**ANDS were given to two men, and to the Heires of their two Bodies begotten, and the one died without Issue, and the remainder of the halfe reverted to the Donor, and he brought an Action of waste against the surviving Donee of houses and Lands to him demised, and agreed that the Writ was good, but it was a question if

if the Count shall be generall, or of a halfe only, notwithstanding that both the parties were Tenants in Common of the reversion.

Michaelmas 1611. 9. Jacobi; in the Common Bench.

Ralph Bagnall against John Tucker. after 83.

**T**RINITY 9. or Michaelmasse 8. Jacobi. Rot: 3648. The Case was, Copy-holder for life, remainder for life purchaseth the freehold and levies a Fine with Proclamations made five yeares passe, and then he died, if the remainder were bound by the Fine or not, was the question, and it seemes that it shall not be Barr, for he is not turned out of possession in right. So if a man hath a Lease for remainder for yeares and the first Lessee for yeates purchase the freehold, and levie a Fine with Proclamations, and five yeares passe, this shall not barr the remainder for yeates, insomuch that this was Interest of a Terme, and remains an Interest as it was without any alteration, and it was not turned to a Right. And yet it was agreed that the Statute of buying of pretended rights extends to Copy-holds: See *Lessures Case* 5. *Coke* 125. See *Pasche* 1612. for the Judgment.

Note if an Attorney of this Court be sued here by Bill of Privilege, he ought not to find Bayle: But if he be sued by Originall, and comes in by *Capias*, then he ought to find Bayle.

Lease by the  
Dean and  
Chapter of  
Norwich.

In covenant upon a Lease made by the Dean of *Norwich*, Predecessor to the Dean that now is, and the then Chapter of the Foundation of *Ed. 6.* King, for injoying of Land devised to the Plaintiff for three Lives discharged of all incumbrances, and also to accept Surrender of the same Lease, and to make a new, and for breaking of covenant, the same Dean and Chapter in such a yeare of the Raine of *H. 8.* had made a lease for years not determined, by which the lands devised were incumbered, upon which the Defendant demurred. And *Hutton* Serjeant for the Defendant argued, that the Lease was by the Statute of 130f *Eliz.* as to the successor of the Dean which made it, for that it was a Lease for years in being at the time of the making of that, as it is resolved in *Elmers Case* upon the Statute of 1 *Eliz.* if a Bishop makes a Lease for years, and after makes a Lease for life, the Lease for life is void to the Successor, and so it is in the case of Dean and Chapter, and though that the words of the Statute are generally that such a Lease shall be void to all intents, purposes, and Constructions, yet he intended that it shall not be voyd against the Bishop himselfe, as it was resolved in the case of the next Advowson by

*Hutton.*

by the Bishop in *Singletons Case*, cyted in *Lincolne Colledge Case* 3. *Coke* 39. b. And he intended if the Lease be voyd against the Successors that then the covenants also are void, as it is agreed in the 28 H. 8. 28. *Dyer* 189. 190. and he cited one *Mills* case to be adjudged in the 29 and 30. *Eliz.* in the Kings Bench, that if a Parson make Lease and avoid by non-Residence, the Covenants also are void as well as the Lease, and also he intended that the Lease for life was void, inso much that it was to be executed by a Letter of Attorney, and the Attorney had not made livery till after two Rent dayes were past, and for that the Livery was not good, for when a man makes a Lease for life rendring Rent, with Letter of Attorney to make livery, here is an implied condition, that Livery shall be made before any day of payment be incurred, and it is as much as if a man had made a Lease for life, without any Letter of Attorney to make Livery before such a day there, if the Attorney do not make Livery before the day, but after the Livery is void, inso much as it is contrary to the Condition, so in the case here, for if Livery made be after a Rent day, it may be made after twenty, and so immediately before the end of the Terme, and if the Rent be void, for this cause the Covenants also are void, and if a man bargain and sell his Mannor, and the Trees growing upon it, the Trees do not passe without Inrollment, inso much that it was the intent of the parties that it should so passe, and for that they do not passe without the Mannor, also he intended that the Count is repugnant, inso much that that contains that the last Lease for life was made in the time of *Ed. 6.* and after by the Dean and Chapter of the foundation of *Ed. 6.* and after that contains that the same Dean and Chapter have made a former Lease in the time of *H. 8.* Which cannot be if the Dean and Chapter were of the Foundation of *Ed. 6.* and for that the Count ought to have contained the alteration of the foundation, as in case of prescription, as in *Tringhams* case, 4. *Coke* 38. *Wyat Wilds* Case 8 *Coke* 79. 2. and 3. *Phil. and Mary Dyer* 124. A good Case, and he intended that a declaration ought to have precise certainty, as in 8. and 9. *Eliz.* 254. *Dyer*, for a thing which cannot be presumed, shall not be intended, as it is agreed in *Pigotts* Case 3. *Coke* 29. a. otherwise of Plea in Bare, for that is sufficient if it be good to common intent, also he intended that there is variance between the Count and the Covenant, for the declaration is that the Dean and Chapter covenanted with the Plaintiffs, the Covenant is generall, that is, that the Dean and Chapter covenant, and doth not say with who, and for that the Count also shall not be good, and so he concluded and prayed Judgment for the Defendant.

*Haughton* Serjeant for the Plaintiff, intended that the Covenants shall *Haughton*

shall not be voyd, notwithstanding that the Lease it self be voyd, & he intended that a lease made by a Parson shall be good against himself, but it shall be voyd by his death to the Successor, but a Lease made by a Dean and Chapter shall be void to the Dean himself, and the Covenant shall be in force, notwithstanding that the Lease be voyd, insomuch that the Covenants are collaterall, and have not any dependance upon the Lease, but to the inherent Covenants, which depend upon the Lease and the Estate, as for Reparations and such like shall be voyd by the avoidance of the Lease, but he intended that Covenant to discharge the Land from incumbrances, doth not depend upon the Interest, but it is meerly collaterall, and for that it shall not be void, and with this difference he agreed all the Cases put of the other part, as in 45 *Ed.* 3. 3. Lease was made to the Husband and Wife, the Husband dies, the wife accepts the Land, and shall not be charged with collaterall Covenants, notwithstanding that shee agrees to the Estate, insomuch that they do not depend upon the Estate, and to the Livery made after two Rent dayes incurred, he intended that Livery is good, that notwithstanding for the deferring of the Execution of a letter of Attorney shall not defeat the Lease, or other meane act which amounts to a Command, for the Lessor takes the profits in the mean time, and it is not like to *Littletons* case, that if a man devise his land to his Executors to be sold, and they take the profits and do not make Sale, that the Heir may enter, insomuch that the Executors have not performed the Condition, and it was not the intent of the Devisor that they should take the profits in the *Interim* to their own use, and he intended that the declaration was not repugnant, for it is of the aforesaid Church, and not of the Dean and Chapter aforesayd, and also there need not such congruity, as it were the *Foundation* of the Action, insomuch that this is only Allegation of the truth of the matter, see *H.* 7. 18. For variance upon shewing in Deed, and 17 *Ed.* 3. 33. *b.* and here the aforesaid shew, that it is the same in substance though it vary in words, and though that the name is altered, yet are the same persons in substance and the same Body, and though that it be as it is intended to be of another part, yet it is but name, and the *Foundation* then is not Issuable, as if the King *H.* 8. had been the Founder and made speciall provision in the Foundation, that after the Time of *Ed.* 6. it shall be said to be the *Foundation* of *Ed.* 6. this shall be good, and so he concluded and prayed Judgment for the Plaintiff, see after adjudged.

Michaelmas



*Michaelmas 9. Jacobi 1611. In the Common Bench.*

*The Bishop of Ely.*

**T**HE Bishop of *Ely* granted an Office with the Fee for the exercising of that, if it be an ancient office, it is a good grant, and if the Fee be newly increased, yet *Foster* Justice thought that the Grant shall be good for the Office, and for so much of the Fee as hath been anciently granted with the Office.

Office granted  
by a Bishop.

*Michaelmas 1611. 9. Jacobi in the Common Bench.*

*Holcroft against George French.*

**I**N an Action upon the Case upon an *Assumpsit*, if the consideration be *Executory*, then the Declaration ought to contain the time and place where it was made, and after it ought to be averred *In Facto*, when it was performed or executed accordingly, but if it be by way of Reciprocall agreement, then the Plaintiff may count, that in consideration that he hath promised for the Defendant, the Defendant hath promised to do another thing for him, there he need not that the Declaration contain time or place for the consideration, or otherwise that it is performed and executed.

But if in the first case, where it is *executory*, that is also an averment that it is executed there, if the Defendant plead *Non Assumpsit* generally, and do not plead the speciall matter, he cannot after take exception to that Count for the Default aforesayd, where he pleads specially to that, as in an action of *Trover* the Conversion ought to be averred to be in a certain place, and so in submission and Arbitrement, they are contained in the declaration, it need not to expresse any time or place certain, but if the Defendant, pleads that the Arbitrators made no award, or that the parties have not submitted themselves to their award, there the Plaintiff may reply, that the Arbitrement or Submission was made at such a place, and this was agreed by all the Justices.

*Michaelmasse 1611. 9. Jacobi, in the Common Bench:*

*Sir Edward Puncheon against Thomas Legate.*

**I**T was adjudged in the Kings Bench, and affirmed upon a Writ of Error in the Kings Bench, that an action upon the case upon  
T an



*Assumpfit.*

an *Assumpfit* made by the Testator is very well maintainable against the Executor, and this was for Money borrowed, and so the Count speciall, but not upon generall, *Indebitatus Assumpfit*, but is good without any averment, that the Executors have assets over the payment of Debts due by specialty and Legacies, and he sayd, that the Record of the Case of 22 H. 8. with this agrees, and that the book in this is misprinted, and so *Coke* cheife Justice who publickly reported this Judgment in the Common place, sayd, which was adjudged in the 11 H. 8. in this Court.

*Writ of Right.*

Note that Land of which a Writ of Right Close lyeth, shall be assets in a Formedon, and it is a Free-hold and not a Copy-hold, and so are all Lands in ancient Demesne, 3 Ed. 3. 14 H. 4.

It is no matter what is known to the Judge, if it be not in the form of Judgment.

Pasche 1611. fol. 50.

*Haughton.*

**H** Aughton Serjeant for the Defendant, argued that the entry of him in Remainder is not lawfull, insomuch that he intended it is not any forfeiture of the Estate tayle, and first he argued that the condition is not good, but repugnant to Law, and for that voyd, and yet he agreed that Tenant in tayl may be distrayned from making unlawfull Acts, but here the condition tends to restraine him from doing of things which are lawfull as if aman makes a Gift in tayl, upon condition that the Wife of the Donee shall not be indowed, or that the Husband of the Donee shall not be Tenant by the Curtesie, or that a Feoffee shall not take the profits of the Land, though that the profits may be severed from the Land, as in 16 Ed. 3. Formedon was brought of the profits of a Mill, yet the condition is voyd, insomuch that it is against the nature of an Estate tayl, or in Fee-simple to be in such manner abridged, so if a man makes a gift in tayl upon condition, that the Donee shall not make waste, the condition is void, for the making of waste is a priviledge which is incident to an Estate tayle, and for that the condition restraynes the Tenant in tayle of a thing which the Law inables him to do, the condition is voyd, so a Donee in tayle upon condition, that he shall not make a Deed of Feoffment or Lease for his own life as it is agreed in *Mildmayes* Case, so here when the condition restraynes Tenant in tayl of concluding and agreeing, the which in him is not any wrong no more then if a man should make a gift in tayl upon condition that the Donee should not bargain and sell the Land, this is voyd, insomuch that he doth not make any wrong or discontinuance: So in the case here, for the thing which is restrayned, that is (concluding

ding & agreeing) is init self a lawfull act, and also this is only the affections and qualities of the minde, that they cannot make an Estate conditionall, if an open act be not annexed unto it, but he agreed that if a man make a gift in tayle, or a Lease for life of white acres, upon condition that the Donee or Lessee shall not take the profits of Black acre, this is a good condition, for this doth no wrong, nor is repugnant to the Estate given, or leased. And secondly, he argued, that admitting it is a good condition, yet here is no act done to operate (conclusion or agreement) which might make a forfeiture, for he sayd that *Mildmayes* case was an expresse condition, that Tenant in tayl should not suffer common recovery, the which he might lawfully do at the common Law, and he was not restrayned by the Statute of *Donts conditionalibus*, which was doubted till 12 Ed. 4. but here he intends that the (agreement and conclusion) in this case shall make no forfeiture, in respect that the Wife in whom the Estate, was marryed at the time of the making, and then when her Husband joynes with her, it shall be sayd the agreement of the Husband, and not the agreement of the Wife, and yet he agreed the case in, 20 H. 8. b. *Dyer* 1. that if a man makes a Lease for yeares upon condition, that the Lessee his Executor or Assignes shall not alien, and thereif the Wife executrix, and her second husband alien, that this shall be forfeiture, insomuch that there the condition followes the Estate, and is inherent to it, but here the agreement is collaterall and personall, and this depends upon the Estate, as if condition be that a woman shall not beate *J. S.* and she takes a Husband which beats him, this shall not be forfeiture, for the condition is annexed to the person of the wife, and for that the beating of the Husband shall be no breach of the condition, but the waft of the Husband is the Waft of the Wife also, for that followes the Estate and is not personall, so he agreed that acts made by a Wife married, the which she is compellable to do are good, as partition between Coparceners, as it is sayd by *Littleton*, or Administration of Goods by Executor or Administrator, or to make attorneyment, so of things made for her benefit, as accepting an Obligation, or the bringing of an action of Waft upon a Lease made by him are also good, but here the agreement and conclusion made by her and her Husband, are for the disadvantage of the Wife, and for that they are meerly voyd, as to the Wife, as in 3 H. 6. 19. 50. Contract is made with the Husband and Wife and they joyne in debt upon that, and the writ abated, insomuch that the contract to the Wife is void, and shall be intended to be made with the Husband only, and so in *Russells* case 5 *Coke* 27. b. It is agreed that a marryed Wife cannot do any thing as Executrix to the prejudice of her Husband, so in 45 Ed. 3. 11. Lease was made by Husband and wife,

and they covenanted to make suerties, and after the Husband dies, and the Wife accepts the Rent, and she shall not be bound by her Covenant, inſomuch that this was Colaterall to the Eſtate, and if it be ſo that the agreement made by the married Wife is void to her, then it is no agreement and by conſequence no forfeiture of the Eſtate: Alſo he intended that the concluſion of the condition, for the words of the condition depends only upon the agreement and concluſion, and not upon any Act made: So that the ſuffering of any Act, doth not make any matter in the caſe, nor is to the purpoſe, and alſo the Replication relies only upon the agreement, ſo that the Recovery is not materiall: And he intended that it is a condition, and that it cannot be Limitation, inſomuch that the words are, that the Eſtate ſhall ceaſe, as if ſuch perſon had not been named in the Will, and ſo that the Eſtate ſhall ceaſe, as if he had been dead, which are words of Deſeazance only and not of Limitation, for he doth not appoint the Eſtate to continue ſo long: And alſo the words are repugnant, for it cannot make the Eſtate void as if he had not been named, for this is only the office of an Act of Parliament to make a man to be dead to one, and to be alive to another purpoſe; and ſo he concluded, and praied Judgement for the Defendant: *Nicholls* Serjeant for the Plaintiff argued, that it is a matter ſufficient upon which Judgement ſhall be given for the Plaintiff, and he firſt conſidered the words of the Condition; that is, if the deviſees by themſelves or by any other, ſhall make any concluſion or agreement, &c. This ſhall be a forfeiture; as in 28, H. 8. 13. *Dyer* 65. Where a Leaſe was made to the Husband and Wife, *Proviſo* that if they are diſpoſed to ſell and alien the Tearme, that the Lefſor ſhall have the firſt offer, and agreed, that if that be a Condition, and the Wife ſurvive the Husband, notwithstanding that it was not her Deed, but the Act of the Husband, ſhe ſhall be bound by that, inſomuch that her Eſtate is bound with that, and this was the pleaſure of the Lefſor, and ſhe cannot hold it otherwiſe then it was given, and 47. *Ed.* 3. 12. If a man makes a Leaſe for yeares to the Husband and Wife, and after outs them, they ſhall joyne in a Covenant, and ſo 48. *Ed.* 3. 18. They joyne in a Fine, yet there the Husband only brings Debt for the money, notwithstanding that it be the Land of the Wife which was ſold, and 38. *Ed.* 3. 9. If the Husband and the Wife joyne in Covenant: See 45. *Ed.* 3. 11. b. Where they joyne in Leaſe, and alſo to make further aſſurance, and the Husband and the Wife alſo charged with that, and ſo in the 20. H. 6. 25. Feoffment was made to a woman ſole upon condition, and after ſhe takes a Husband, which breaks the Condition, ſo in 35. *affiſ.* 11. A woman ſole makes a Feoffment upon condition to re-enfeoff upon request, and after takes a Huſb

*Nicholls.*

a Husband, and then makes request and good, and if it be so in these cases, then in this case the Wife shall not be received, to say the agreement was made against her will, and for this, see the *Statute* which gives *Cui in vita* to the Woman, where the words are, to whom she in her life could not contradict.

And after this agreement, if the Husband give warrant of Attorney to suffer Recovery this is sufficient, as it is agreed in 4. *Ed. 3.* and in 6. *Coke* 41. *Mildmayes Case* is agreed: That if a man make a Feoffment to a Husband and a Wife upon condition that they shall not alien, it is good to restraine alienation, by which it appears that if they Joyne in Feoffment, that this shall be forfeiture, and yet this is the Feoffment of the Husband only, So here the agreement of them, notwithstanding it is the Act of the Husband, yet inso much that it is against the expresse words of the Condition, this shall be breach of the Condition, and he intended that the words of the Condition amount to as much, as if he had said, that neither the Daughter sole, nor the Daughter with another Daughter, or with another person shall make agreement, and the other person of necessity shall be intended her Husband, and so this agreement by the Husband and the Wife is within the words of the Condition: And also he saith that it is argued in *Becwiths Case* 2. *Coke* that a married Wife may declare a use of a Fine which is levied of her Inheritance, and if the Husband declare uses, the Wife may controule them: And if an Estate be conveyed with power, that the Husband with the assent of his Wife may revoke that, the assent of the Wife to such revocation is good: So if *Proviso* be, that a married Wife only without her Husband may make revocation of uses and declare new this is good, and revocation made by the Wife, and declaration of new uses are very good, and he agreed that in matters of Record, the Husband cannot prejudice the Wife without her consent, as Warrant of Attorney upon a *Quid Juris Claimat*, or *Per que servitia*, or other Act which concerns her Inheritance, as in 9. *H. 6.* 52. 46. *Ed. 3.* 11. 43. *Ed. 3.* 5. and 27. *H. 8.* If a married Wife joyne with her Husband in a Feoffment of her owne Land, rendring Rent, and after the Husband dies and the Wife accepts the Rent, this shall bind her, which proves that it was her Feoffment as well as the Feoffment of the Husband. Secondly he considered the words of the Condition, which are: (Conclude and agree.) &c, the which he intended not to be so uncertaine, as going about, but they are Issuable and triable, as it is agreed in 5. *Ed. 4.* 6. *Com.* 56. a. *Wybys* and *Taylbois Case*, consent to a Ravishment within the *Statute* of 6. *R. 2.* is Issuable and triable, so of consent and agreement within this Condition, for though that the words are consent and agree, yet it ought to be otherwise an

Act

Act subsequent, that is, reconvey, suffer, or other such Act or agreement shall not be forfeiture, for to make Elopment which shall be a forfeiture of Dower, there ought first to be consent, but that is not sufficient, but there ought to be also departure from the Husband and then the Law adjudges upon all the Act: So here when it is an agreement, and another Act subsequent, which is executed, then the Law shall judge upon altogether: and for that this agreement consists of two parts, first when the Wife upon the motion of the Husband concludes and agrees to do the Act, which is the beginning of the agreement, and then when the Husband and the Wife upon that joyne in Deed indent, as in this case, this is a consummation and makes a breaking of the condition, and this is not like the condition in *Myldmaies Case*, where every going about ought to breake that, as if he goe to Councell to be advised upon his Estate: Thirdly he intended that the condition is not repugnant to the Estate, in respect that an other thing is to be done before the forfeiture, and after the concluding and agreeing, for the Wife remains in *Seisin* after the agreement, till the Recovery or other Act be executed: And also he argued that before the *Statute* of 4. H. 7. of Fynes: Tenant in tayl might be restrained of alienation of his Estate, for untill that he could not Barr the Issue in tayl. So at this day he intended that a gift in tayl upon condition that he shall levie a Fine without proclamations this is good, and out of the power which is given to Tenant in tayl to Barr the Estate tayl by the levying of a Fine: And levying of a Fine without proclamations is only a discontinuance, and so tortious, so when a Condition doth not extend to all acts, but only to all unlawful acts, and for that it doth not extend to a Recovery, for that is a lawfull Act, as it is agreed in *Scholasticas Case* 10. H. 7. 10 11. H. 7. 6, 7. 21. H. 7. and 28 H. 8. *Leomans Case*: If an ecclesiasticall person hath a Tearme with this condition, that he shall not alien, and after comes the Estate, which inflicts punishment upon him for keeping of a Farme, and yet it seemes it is a good condition: But so upon the *Statute* of 4. H. 7. of fines, If aman hath agift in tayl with condition that he shal not alien: And after the *Statute* of 4. H. 7. is made which inables him to barr the Estate tayl by fine, yet he intended that the condition should restraine him from all unlawfull Alienations: And he intended as well as such a condition annexed to a Lease for life is good, so is it being annexed to an Estate tayl; for as well as it is in one case for the preservation of the reversion: So is this in the other case, and as in 6. *Eliz. Dyer* 227. Grant of Rent, *Proviso* that it shall not charge the person of the Grantor, shall not extend to the Executors of the Grantor, but shall be determined by the death of the Grantor: And so as a condition that a married Wife or an Infant shall  
not



not alien is good, insomuch that this is wrong, so he intended that if this were a good condition at the Common Law, that Tenant in tayl shall not alien the Estate by 4. H. 7. and 37. H. 8. doth not inable Tenant in tayl to make alienation against such condition: And it hath been agreed that if a man make a Feoffment in fee of the Mannor of D. And after makes a gift in tayl of the Mannor of S. upon condition that the Donee shall not alien the Mannor of D. this is a good condition, and in the 21. H. 7. 12. it is agreed that if a man make a Feoffment *Causa Matrimonij Prolocuti*, and after Divorce is sued, there the free-hold shall be devestd out of the Husband without entry: And also he intended that a man might make a thing by devise, the which he could not make by Act executed, as Authority to sell his Lands to his Executors it good, and yet in all cases of Authorities by Acts executed the Authority shall cease with the life of the party: And for that there shall be one Law of devises, and another Law of Acts executed by the party in his life, as 29. assis. 17. and Fitz. Na. Bre. in *ex gravi querela* last case, the particuler Estate being created by devise, ceases, and remainder takes effect: And then to the exception, that the estate shall cease and remaine to him which had the next remainder, the which is repugnant, as it was intended, and so is *Jermyn and Arscotts Case*: But here the words are that the Estate shall cease, as if the party to which that is limited were dead without Issue from the time of the Contract and agreement, and the remainder to him which hath the next remainder, and not the Issue of him which made the forfeiture, and also this Remainder from the time of the agreement and conclusion, and not from the time of the Act executed, for then it would be too late, for then the Estate is transferred to another, as it was in the cases put by *Anderfson in Corbetts Case*: But here all the Estate limited to him which made the forfeiture shall be determined, and also he intended that the Reason that the Replication containes, that the parties being in actuall possession are only to satisfie the words of the Condition: And so he concluded, and praied Judgement for the Plaintiff.

In dower the *Demandant* recovered Dower of tenths of Wool and Lamb, and how execution shall be made was the question: And the Justices intended that the Sheriffe might deliver the tenths of every 3 yard land, and assign the Yard Lands in *certain*: But after it was conceived that this would be uncertain and unequall, and for that the Sheriffe was directed to deliver the third part of all in generall, and yet the first was agreed to be good: but onely in respect of Inequalities, as in dower of a Mill, the third Toll dish, and of a Villayne the third dayes work, as in 23 H. 8. And it was also agreed that the Sheriffe may assign this dower without a Jury.

Dower of tithes  
of Wool.

*Attachment.*

It was moved, if an *Attachment* be granted against a Sheriffe for contempt after he is removed out of his Office; and the Justices intended that not, insomuch that now he is no Officer, and for that he cannot be now fyned, and without fyne they did not use to Imprison, but the Judges would be advised to see the *Presidents* of the Court in such a case.

*Michielmas 1611. 9. Jacobi, in the Common Bench.*

Kemp, and Philip his Wife, James, and Blanch his Wife, *Plaintiffs*, against Lawrere and Trollop, and the Wife of Gunter, *Executrix*, during the minority of the Wives of the *Plaintiffs*.

*Executrix during nonage.*

*Nicholls.*

THE case was, An *Executrix* during the nonage; for so it was, and not *Administratrix*, that is, shee was ordained *Executrix*, till the Wives of the *Plaintiffs* came to their full age, or were married, and then they should be *Executrices*. And this *Executrix* during the minority, brought an action of Debt, and recovered; and before Execution the women *Executrices* took Husbands, and brought *Scirefacias* upon the Record, to have Execution upon the Judgment against these *Defendants* as *Tenants*, which pleaded specially that they had nothing in the Free-hold, nor in the Land, but only a lease for yeares, and that the free-hold was in another stranger, upon which Plea the *Plaintiffs* demurred in Law. And *Nicholls* Serjeant for the *Plaintiffs*, that there is the difference betwixt this *Executor* and an *Administrator* during the minority, as in 26 H. 8. 7. a. if an *Administrator* have Judgment, and dyes before *Executors* or other have sued out their Letters of *Administration*, they shall have no execution of this Judgement, insomuch as he comes in paramount the first *Administrator*, and as immediate *Administrator* to the first *Intestate*, as it is agreed in *Shelleys* case. So the *Administrators* of one *Executor* shall not have execution of a Judgment given for the *Executor*, as it is resolved in *Brudenels* case, 5 Coke, the 9. b. And in 21 Edw. 4. It is agreed, if two are made Joynt-Executors, and one of them dies, the other shall be sole *Executor* to the Testator: and if hee make his *Executor*, and dyes, his *Executors* shall be *Executors* to the first Testator: And also there is in *Fox & Gretbrooks* Case in the Com: that one may be *Executor* for certain years, and another after, and this differs from the other cases; for in this case all these *Executors* were in privy one to another: but in the other case one comes paramount the other. But here they are all made by the first Testator and the Will: And he cyted the 2 Case in the Lord *Dyer*, and 18. and 32, Edw. 3. there cyted, where a Purchasor brought a Writ of Errour, and

and was not privy to the first Record. And Grantee of a Reversion brought a *Scire facias* against Conufee of a *Statute-Merchant*, alledging that he had received satisfaction. So if a Parson of a Church recovers an Annuity, and after the Church is appropriate to a house of Religion, the Sovereign of the said house shall have a *Scire facias*. And so if union be made of two Benefices, and yet in all these cases there was no privy to the first Judgement: so he in reversion shall have Errour in Attaine upon Judgment against his Lessee for life, and the Reason is given in *Brudenels Case*, that is, they which may have prejudice may have *scire facias*, and it is not like where two Joynt-tenants are, and one makes a Lease for years, and dyes, the other shall have the Rent, insomuch that he comes in by survivorship, and not in privy. But here the Executors come in in privy, as in case of two Executors are jointly, one dyes, the other which survives shall have Execution of Judgment given for them; for *Administrator* during the nonage is only to the use, commodity, and profit of an Executor, and of a Testator: so that he being Executor to the Testator, he shall have execution. And to the second, that is, that the *Defendants* have nothing but for yeares, and that the free-hold is to a stranger, he intended that this is not good, & yet he agreed that in *scire facias* where a free-hold is to be recovered, speciall non-tenure is a good plea, as in 8 *Edw* 4. 19. and 8 *H.* 6. 32. but not of the contrary, and there also generall non-tenure is no plea: But here where the free-hold is not to be recovered, nor one nor the other is a Plea; for it may be averred that the *Defendant* hath a release from him that hath the reversion: and as in 14 *H.* 4. 5. in *scire facias* to accompt against an Executor who pleads that the Testator was never his *Bayliffe* to give an accompt, and yet it is agreed that this hath been a good plea for the first *Defendant*, and this is the reason that it was not taken, nor was allowed for a good plea in the 11 *H.* 4. 11. Insomuch that this amounts to non-tenure; and in 44. and 45. *Eliz.* *Mich. Rot.* 834. it was adjudged in *Scire facias*, where the *Defendant* pleads that he was not *Tenant* of the *Free-hold*, and adjudged no plea: And so he said it was adjudged in the case of *All-soules Colledge*, in *Scire facias* to have execution of a Judgment in *Ejectione firme*: and the *Defendant* in the *Scire facias* pleads, that he was but *Lessee* for years, and adjudged no Plea, insomuch that nothing was to be recovered but only the term, and not the *Free-hold*, and so he concluded, and prayed Judgment for the Plaintiff in *Scire facias*. *Harris* Serjeant argued to the contrary, and he intended that the Return of the *Sheriffe* is void, insomuch that the *Writ* commanded him to give notice to the *Tenants* of the Land in *Fee-simple*, and hee did not return, that those which he had returned were *Tenants* of the Land in *Fee-simple*,  
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and so these words of the *Writ* are not answered, and so no *Tenant* is returned at all.

And it is not like to the Case in 2 *H.* 4. for there the Return was according to the Exigent of the *Writ*, but here it is not so. And to the first matter he intended, and agreed, that an *Executor* of an *Executor* may sue execution had by the first *Executor*, insomuch that hee comes in in privity. But he said, that so it is not in this case, and that there is no difference betwixt this case, and the case cyted in *Shelleys* case, that is, that *Adminiftrator* of *Adminiftrator* shall not sue execution, insomuch that he comes in peramount *Adminiftrator*, and accords with this Case, 2 *Eliz.* in the Lord *Dyer*: If two Joynt-Tenants are, and one makes a Lease for years, rendring Rent, and dyes, the Survivor shall not have the Rent, insomuch that hee commeth in peramount him; and to the other he intended, that the speciall *non-tenure* is a good plea, as well in *Scire facias* to have execution of damages, as of Free-hold, as in 24 *Edw.* 3. 31. and 5 *H.* 5. 1. and 9. *H.* 5. 11. It is resolved, that in *Scire facias* speciall *non-tenure* is a good Plea, and the books of 8 *H.* 6. 31. cyted before, there is *joynt-tenancy* pleaded to one part, and speciall *non-tenure* to the other part by Lease for years, and the question is if it might be pleaded apart: And in 8 *Edw.* 4. 14. Is *Scire facias* upon Recovery by *Writ* of Right *Patent* in base Court, and that the *Defendant* cannot plead release of the Lessor, and so the joyning of the Mife may be forfeiture of his Estate: And he said that it was adjudged in 16 *Edw.* 3. *Scire facias* 5. that *scire facias* to have execution of a *Fyne* shall not be sued against a Lessee for years, but against him which hath the *Free-hold*; but where Debt or Damages are to be recovered, there it may be sued against him which hath only Lease for years, insomuch that the possession is to be charged; and so he concluded, and prayed Judgment for the *Defendants*, and it is adjourned.

*Michaelmas* 1611. 9. *Jacobi*, in the Common Bench.

### Crogate against Morris.

*Copy-holder.* **T**He case was this, *Copy-holder* prescribes to have common in the Waste of the Lord, and brings action of Trespasse against a stranger for his Beasts depasturing upon the Common there, and *Harris* Serjeant argued that this action is not maintainable for two causes. First, insomuch that he is a Commoner; for as it is said by *Brack Justice*, 12. *H.* 8. 2. a. Commoner cannot have an action of Trespasse, for the Common is not Common, but after the Commoner hath taken that, and then before that he hath taken that he hath no wrong nor damage, but the damage is to the Tenant of the Land: As if a Lessee



Lessee for years be outed, and he in reversion recovers in *Assise*, hee shall not have damage, insomuch that the damage was made to the Lessee, and the 22 *Assise*. 48. 15 H. 7. 1 2. b. agreed that Commoner cannot maintain action of Trespas, nor no other but the owner of the Soil, but 13 H. 8. 15. by *Norwich*, 15 H. 7. 6. 5 H. 7. 2. 24 *Edw.* 3. 42. Commoner may distrain and avow for doing damage. 2. He intended that this action is not maintainable, insomuch that every other Commoner may also have the action of Trespasse, for if it be wrong to one, it is wrong to every one of them, and so the stranger shall be infinitely punished, as in *Williams Case*, 5 *Coke*, 72. b. where it was adjudged an action of the Case doth not lye for the Lord of the *Mannor* to prescribe, that a Vicar ought to administer the Sacraments in his private Chappell, to him, his *Men-servants* and *Tenants* within the Precincts of the said *Mannor*, and adjudged that it doth not lye, insomuch that then every of his *Tenants* might also have action, and so the Vicar shall be alwayes punished: So in 27 H. 7. 27. a. A man shall not have an action upon the Case for nuisance made in the high way; so it is 5 *Ed.* 4. 2. for trenching in the high way, see 33 H. 6. 26. a. accordingly; and so he concluded that the action is not maintainable, and prayed Judgement for the *Defendant*.

*Dodridge.*

*Dodridge* the Kings Serjeant, to the exception which hath been made by the other party, that the *Plaintiff* ought to averr that he hath Beasts which ought to Common there, and that his Beasts have lost their Common, that need not to be averred, but it shall be pleaded by the other party; for if he have distrayned the Beasts of a stranger, doing damage, he need to averr no more in this action, and to the other matter, and the two Objections which have been made by the other part: First, that the Commoner hath no right to the Common, till he have taken it by the mouth of his Beasts; to that he said, that the Commoner hath right to that before that it be taken by such mouths of his Beasts: and notwithstanding that it seems by the time of *Ed.* 1. That Commoner cannot grant his Common till he have Seisin of that, yet 12 H. 8. is otherwise, and that a Commoner may have an action the name implyes, for he hath Common with others, and a stranger which is no Commoner cannot do wrong, but this is damage to him; and he cyted *Bracton*, 430. that there are two forms of *Writs*, 1. *Curfitory Writs*, 2. *Commanding Writs*: The first of those which are formed, and are of course, and the others such of which there is no form, but are to be formed by the Masters of the *Chancery*, according to every particular Case: So that there is not any Case, but that the Law affords a *Writ* and remedy for that, as in 28 *Edw.* 4. 23. *Action upon the Case was framed against an Officer, which gave priviledge to one as his servant, which was not his servant: and it is not like to the Case in 11 H. 4. 47. 2. where a School-master*



brings an action upon the Case against another for erecting of a School in the same Towne to his damage, but this was damage without Injury. But here the Commoner hath received wrong and damage; but yet he agreed that the Commoner could not have action of Trespass why he broke his Close, for that is proper for the owner of the Soile. But it hath been agreed to him, that he might distrain them, doing damage; and the reason of that is, insomuch that he hath received damage, and amends may be tendered unto him in recompence of his damages, without any regard to other Commoners, as it is agreed in 24 Edw. 3. 42. And to the Objection, that if one Commoner may have action, then every Commoner may have the action, and so the stranger shall be infinitely punished. And to that he said it is a Publique losse and private; and when the publique wrong includes private damage to any man, there he to whom the private damage is done may have action: And he said, that the Register contains many Writts for publique wrong, when that is done to private men, as fol. 95. A man fixes a pale, crosse a navigable River, by which a Ship was cast away; and the Owner maintained action of Trespasse: And fol. 97. A man brought Trespasse against one which cast dung into a River, by which his Medow was drowned; so if the River be infected with watering Hemp or Flax, he which hath fishing there may maintain action of Trespasse: and 2 H. 4. 11. Action of Trespasse by one for ploughing of Land where one had a common way; and so it is 13. H. 7. 17. One brings an action of Trespasse against another for erecting a Lyme Kill where many others are annoyed by that: So by an assault made upon a servant, the Master and servant also may have severall actions; and so in the other cases many may have actions, and yet this is no reason to conclude any one of them, that hee shall not have his action, for in truth those are rather actions upon the Case, then actions of Trespass, for the truth of the Case is contained in the Writ. Also in this case it doth not appeare that there are any other Commoners which have Common there, and for that this Objection is not to the purpose: and it appears by Heisman and Crackesfoots Case, 4 Coke 31. That Copy-holder shall have Common by prescription in the demesnes of the Lord, and so he concluded, and prayed Judgment for the Plaintiff.

Coke.

Coke cheife Justice said, that it was adjudged in this Court, *Trinity*, 41. Eliz. Rgr. 153. b. between Holland and Lovell, where Commoner brings an action upon the Case, as this Case is, against a stranger which pleads not guilty, and it was found by verdict for the Plaintiff, and it was after adjudged for the Plaintiff, for insomuch that the Plaintiff may take them damage feasant that proves that he hath wrong, and this is the reason that he may distraine (doing damage.) And by the same reason, if the Beasts are gone before his coming,

ming, he may have action upon his Case, for otherwise one that hath many Beasts may destroy all the Common in a night, and doe great wrong, and sha l not be punished: and it is not like to a Nufance, for that is publike, and may be punished in a *Leet*; but the other is private to the *Commoners*, and cannot be punished in another place nor course: and he also cyted one *Whitchands* case to be adjudged, where many *Copy-holders* prescribe to have *Loppings* and *Toppings* of *Pollards*, and *Husbands* growing upon the Waste of the Lord, and the Lord cuts them, and one *Copy-holder* only brings his action upon the Case, and adjudged that it was very well maintainable, notwithstanding that every other *Copy-holder* may have the same remedy. And he said also, that so it was adjudged in the *Kings Bench*, *Hillary 5 Jacobi*, *Rot. 1427*. in *George Englands* Case: And 2 *Edw. 2. b. Covenant 49*. If a man *Covenant* with 20. to make the Sea banks with *A. B.* and every one of them, and after he doth not doe it, by which the Land of two is drowned and dammified, and they two may have an action of *Covenant* without the others; *Quere*, for it seems every one shall have an action by himselfe. But *Foster* and *Wynch* Justices seemed that the *Plaintiffe* ought to sue in his *Court*, that the Beasts of the stranger escaped in the *Common*, or were put in by the Owner, for it may be they were put in by the Lord which was owner of the Soile, or by a stranger, in which cases the Owner of the Beasts shall not be punished: But *Coke* and *Warburton* seemed the contrary, and that this ought to be averred and pleaded by the *Defendant* in excuse of the *Trespasse*, as in action of *Trespasse* (why he broke his Close) And so it was adjourned; see *Gosnolds* case, 490. see *Judgment*.

*Pasche 1612. 16. Jacobi, in the Common Bench* was moved by *Henry Heggins* against *George Biddle*.

**I**N *Replevin* the *Defendant* made *Consuance* as *Bayliff* to *Sir Thomas Leigh*, and *Daine Katherine* his Wife, intimating that *Isabel Bradburn* was seised of the place where, &c. in, their demesne as of *Fee*, and so seised the first of *June*, 15 *H. 8.* gives this to the Lord *Anthony Fitzherbert*, and *Maud* his Wife, and to the Heirs males of their bodies, which have Issue *Thomas Fitzherbert*, Knight, *John Fitzherbert*, and *William Fitzherbert*, *Anthony* and *Maud* dyed, and the said place where, &c. descended to *Sir Thomas Fitzherbert* as Heire to the *Donces* to the *Intayl*: and the said *Thomas Fitzherbert* the 5. of *April*, 6 *Edw. 6.* of that enfeofed *Humphrey Swinnerton*, *Ralph Cotton*, and *Roger Bailly*, to the use of *William Fitzherbert*, and *Elizabeth* his Wife for their lives, and after to the use of *Sir Thomas Fitzherbert*, and the Heirs of his body; the remainder to the use of the

*Replevin.*

the right Heirs of the said *William Fitzherbert*: *William Fitzherbert* dyed, *Sir Thomas Fitzherbert* disseised the said *Elizabeth*, and the said *John Fitzherbert* had Issue, *Thomas*, and dyed, & *Sir Thomas Fitzherbert* dyed without Heir of his body, and the said place where, &c. descended to the said *Thomas* as Cousin & Heir of the said *Sir Thomas*, and Son and Heir of the said *John Fitzherbert*, which enters, and was seised to him and to the Heirs Males of his body, as in his Remitter. And the said *Thomas Fitzherbert*, 4 of Novemb. 39. *Eliz.* by Indenture of Bargain and Sale enrolled in the Chancery within six moneths, bargained and sold the said Land to *Sir William Leighton* & his heirs, and *Sir William Leighton*, 5 of Novemb. 43. *Eliz.* by Indenture enrolled within six moneths for 4000. l. bargained and sold the said land where, &c. to *Sir Thomas Leigh*, and Dame *Katherine*, as aforesaid, and so avowed the taking for doing damage. And the Plaintiff for Barr to the said Avowry, pleads, that well and true it is, that the said *Sir William Leighton* was seised of the said place where, &c. in his Demesne as of Fee, as it was alledged by the Defendant: But further hee saith, that the said *Sir William Leighton* so being thereof seised, 1 Decemb. 44. *Eliz.* enfeoffed the Plaintiff in fee, and by force of that the Plaintiff was seised, and put in his Beasts into the said place where &c. without that, that the said *Sir William Leighton* bargained and sold the said Land in which, &c. to the said *Sir Thomas Leighton*, and *Katherine* his Wife, as in the Conufance hath been alledged by the Defendant, upon which the Defendants joyn Issue; and it was agreed by all the Justices, that notwithstanding this admission of the Parties, is an Estoppel by the pleading, yet as well the Plaintiff as the Defendant were admitted to give another evidence to the Jury against their own pleading; that is, that *Sir William Leighton* was not seised, and so nothing passed by the bargain and sale; and also that *Sir Thomas Fitzherbert* had the possession by acceptance of the surrender of the estate conveyed to *William Fitzherbert* and his Wife, notwithstanding it was admitted by pleading, that he had that by Disseisin: And all the Justices agreed, that the Jury shall not be concluded by the pleading of the parties, insomuch that they are sworn to speake the truth.

*Pasche* 1612. 10. *Jacobi*, in the Common Bench.

Brook Plaintiff, against Cobb.

Waste.

**I**N Waste the Plaintiff assigns waste in cutting down of 20. Oaks in such a Close, and 40. Oaks in such a Close, &c. Upon the Evidence it appears that the said Oaks were remaining upon the Land for standils, according to the statute; at the last felling of that, and they were

were of the growth of 16. or 20. years, and that tithes were paid for it. And it was agreed by the Lord *Coke* and all the Justices, that this was no Waste, inasmuch it was felled as Acre wood? And it was said by the Lord *Coke*, that though it be of the age of 20. or 24. yeares, yet if the use of the Parties be to sell such for seasonable Wood, this shall not be Waste; and if Tithes be paid for that, it appears that it is no Timber.

Doctor Mannings Case in the Star-chamber.

ONE *Golding* as an Informer, and not as party grieved, exhibits his Bill in the *Star-chamber* against Doctor *Manning*, Chancellor to the Bishop of *Exeter*, for Extortion, Oppression, and other offences. It was resolved, that when a Bill contains any particular offences, and after the same Bill contains generall words, which includes many offences of the same kind; And the Plaintiff proves the particular offences, he may examine other particular offences also included within these generall words, in supplement and aggravation of the particular offences contained in the Bill; and if they be proved, the Court will give the greater and high sentence against the Defendant in respect of them, notwithstanding that they be not particularly expressed in the Bill. But if the Plaintiff hath not proved any of the offences particularly expressed in the Bill, the Defendant shall not be censured by the particulars grounded upon the generall words of the Bill. And if a man which is not party grieved, exhibite Bill for offence made to another person; as against whom the offence was committed, he shall not be allowed as Witnesse, inasmuch as he is party grieved, and by that he should be a witnesse in his own Cause.

*Pasche 1612. 10. Jacobi, in the Common Bench.*

William Peacock Plaintiff, against Sir George Raynell

IN the *Star-chamber* the Plaintiff exhibits his Bill against the Defendant for Libelling and Infamous Letters, the which was in this manner, The Plaintiff being Heire generall to *Richard Peacock* which was of the age of eighty six yeares, and had Lands of Inheritance to the value of 8. or 900. pound per annum, and the Defendant had married the Daughter of *Sir Edward Peacock*, which was a yonger brother of the said *Richard Peacock*, and the said Defendant perceiving that the said *Richard Peacock*, had purpose to settle his Inheritance upon the said Plaintiff, and intending to remove the affection of the said *Richard* from the Plaintiff, and to settle that in himselfe,



himselfe, writes a Letter to the said *Richard Peacock*, containing that the Plaintiff was not the Son of a *Peacock*, and was a hunter of *Tavernes*, and that divers women had followed him from *London* to the place of his dwelling, and that he did desire to heare of the death of the said *Richard*; and that all his inheritance would not be sufficient to satisfie his Debts; and many other matters concerning his Reputation and Credit, to that subscribed his name, & this ensealed & directed to the said *R. Peacock*: And it was agreed that this was a Libell, and for that the Defendant was Fined to two hundred pound, and Imprisonment according to the course of the Court: And the Plaintiff let loose to the Common Law for his recompence for the Damages he hath sustained: But if the Letter had been directed to the Plaintiff himselfe, and not to the third person, when it should not have been a Libell, nor if it had been directed to a Father, for Reformation of any Acts made by his Children, it should be no Libell, for it is not but for Reformation, and not for Defamation; for if a Letter containe scandalous matter, and be directed to a third person, if it be Reformatory and for no respect to himselfe, it shall not be intended to be a Libell, for with what mind it was made is to be respected: As if a man write to a Father, and his Letter containe scandalous matter concerning his Children, of which he gives notice to the Father, and adviseth the Father to have better regard to his Children, this is only Reformatory without any respect of profit to him which wrote it: But in the first case the Defendant intended his profit and his owne benefit, and this was the difference.

*Pasche 1612. 10. Jacobi, In the Common Bench.*

### Randall Crewe against Vernon.

**I**N the Star-chamber it was resolved: That if the Defendant do not performe the Sentence of the Court, as here he was to make acknowledgement of his offence committed against the Court of Exchequer at *Chester*, and this acknowledgement was to be made at the great Assises at *Chester*, and he did not performe the Sentence, and yet the Defendant could not be fined for this contempt, but only Imprisonment, and for that he was committed close Prisoner till he performed it: But he could not be fined, inasmuch there was not any Bill, upon which this Sentence should be founded.

*Pasche*



*Pasche 1612. 10. Jacobi, in the Common Bench.*

*Charnocke against Corey, See before.*

**I**N Debt against Administrator: The Defendant pleades two Recognisances acknowledged by the Intestate, which were not satisfied, and that he had not any Goods or Chattells of the said Intestate, unlesse Goods and Chattells which did amount to the Debts due by the said Recognisances: And it seemed to all the Justices, that the Plea was not good: But that the Defendant ought to plead according to the Common forme, that is, that he hath no Goods besides or beyond the Goods to satisfie the two Recognisances, or that he hath no Goodsto such value, which do not amount to the said Sums due by the two Recognisances: And in these cases this manner of pleading is Implied, confession that he hath Goods of such a value, and so they should be assets if the Recognisances be discharged, or remaine of Covin and fraud to deceive Creditor.

*Debt against  
Administrator.*

*Pasche 1612. 10. Jacobi, in the Common Bench:*

*Bicknell against Tucker, see before 75.*

**T**HE Case was: A Copy-hold Estate was granted to one for life, remainder to another for his life, the first Copy-holder for life, accepts a Bargaine and Sale of the free-hold from the Lord, and after that levies a Fine with proclamations, and five yeares passe, and then he dies, and if this Fine shall be a Barr to him, which hath the Copy-hold Estate for life in remainder was the question: And it was argued by *Harris* Serjeant, that the Estate of Fines in the body of that binds all persons, but onely some which have Infirmities, and by the saving Rights, Titles, Claimes, and Interests are saved: But Title comes in the conditionall perciose of saving, that is, so that they pursue their Title, Claime, and Interest, &c. By way of Act or lawfull Entry within five yeares next after the said proclamations had and made: So that in this case the principall matter to be considered is, what thing is operated by the acceptance of the Bargaine and Sale, for if by that the remainder of the Copy-holder be turned to right, then issues that the Fine shall be a Barr: And it seemes that this determines the first Estate for life, and he agreed that it cannot be a surrender, inlomuch that there is a mesene remainder, as it is 37. H. 6. 17. b. 4. H. 7. 10. But this Lease to commence at a day to come cannot be a surrender, but shall be de-

*Copy-hold.*

terminated and extinct by acceptance of a new Lease, as it is there, and in 22. H. 7. 51. *a.* agreed and so it was adjudged in *Hillary* 30. *Eliz.* between *Wilmott and Cutlers* Case, that if a Husband which was seised of a Copy-hold Estate in right of his Wife, accept an estate for life, this determines the copy-hold Estate which he hath in right of his Wife in possession: So if Lessee for yeares accept an estate of one which hath no Estate, yet this determines his Tearme, as it was adjudged *Hillary* 31. *Eliz. Rot.* 1428. *b.* That if Lessee for yeares of a Lease made by the Ancestor accept an estate of *Guardian* in Socage, this determines his Lease, which he had of the Ancestor, and upon that he concluded, that in this case the acceptance of a Bargaine and Sale, turnes the Copy-holder in remainder to a Right, and then it appeares by *Saffins* Case 5. *Coke* 125. That he shall be bound though that he hath only Interest, and so of Title also, and he said that it appeares, by *Kite and Quarintons* case, 4. *Coke* 26. *a.* that a Right or Title may be of Copy-hold Estate, for it is there said by *Wray* cheife Justice, that it shall be with in the *Statute* of 32 H. 8. chapter 9. of buying of Titles; and so concluded.

*Dodridge* the Kings Serjeant agreed, that the sole question is if any thing be here done to turn the Copy-hold-Estate in remainder into a right, for then he agreed that this shall be barred, otherwise not, and to that hee intended, that the first Estate for life shall be sayd to be in *Esse*, notwithstanding the acceptance of the Bargaine and Sale, as to all estrangers, and especially when it is to their prejudice, as if Tenant grant Rent, and after surrenders his estate, now between the parties, the Lease shall be extinct by the surrender, but to the Grantee of the Rent it shall be sayd to be in *Esse*, and if during his life, he in Remainder also grants a Rent, hee shall hold the Land subject to both the Rents, though that the grants be both to one self same person, so if he in Reversion grants his Reversion with warranty, and after the Tenant for life surrenders, and the Grantee be impleaded, he shall never vouch during the life of the Tenant for life, 5 H. 5. *Comment.* 24 *Ed.* 3. And here also is a custome which preserves the Copy-hold Estate in Remainder, and their particular Tenant cannot that prejudice, and for that also it shall not be turned into a right, as if a Copy-hold Estate be granted to one for life by one Copy, and after the Lord grants another Estate for life by another Copy to another, and then the first Copy-holder commits forfeiture, he which hath the second estate cannot take advantage of that, but the Lord shall hold it during the life of the first Tenant, for no act made by the particular Tenant shall prejudice him in Remainder, for otherwise many Inconveniencies would insue upon that, as by secret conveyances, or as if a grantee of a Rent charge, grant that to the Tenant of the Land for his life,

life, the Remainder over, the Remainder shall be good, notwithstanding that the particular Estate bee extinct and drowned, also he intended that the Copy-hold Estate is another thing, then the land it self, and for that the Fine shall not be a Barr, no more then in *Smith and Stapletons Case, Com.* Where a Fine levied of Land shall not be a Barr of Rent, inasmuch that it is another thing, so in this case he intended that the fine shall not be a Barr of the Copy-hold Estate, and concluded, &c. *Wynch* Justice was of opinion that the Fine shall not be a Barr to the Copy-hold Estate in Remainder, for the acceptance of the Bargaine and Sale doth not determine the first Copy-hold Estate for life, as to him in Remainder but only to the first Tenant and the Lord, and betweene those he agreed that the Copy-hold Estate is determined, as in *Heydens Case*, by acceptance of a Lease for years, and for that the Remainder shall not be turned to a Right, and by consequence shall not be barred, and for that he supposed that the reason that the Fine was a Bar in *Saffins Case* 5 *Coke* 123. b. was inasmuch that the Lessor entered, made a Feoffment and after levied a Fine, and it is there agreed that the Feoffment turnes the Estate of the Lessee to a Right, and for that the Fine shall be a barr, and also there the Lease was by limitation of time to have a beginning, but if a man makes a Lease for years to begin at a day to come, and before the beginning of that makes a Feoffment or is disseised, and Fine with proclamation is levied, yet he which hath future Interest shall not be barred, for this is not turned to a Right, and it was not the intent of the Statute of Fines to make a Barr of right, where there was no discontinuance or Estate at least turned to right, and this was the cause that at the Common Law, Fine with Non-claim was no Barr, but where they make alteration of possession, and he cited *Palmer's case* to be adjudged, that a Fine of Land shall not be a barr for Rent, where the case was, Lessee for life, Remainder for life of Rent: The first Lessee for life of the Rent, purchaseth Land and levies Fine of that, and adjudged that this shall not binde them in Remainder of the Rent, no more, if he in remainder levy a fine that shall not prejudice the particular Tenant, and so he concluded in this case, that the Remainder shall not be barred and that the Plaintiff shall have Judgment. *Warburton* Justice accordingly, and he argued that the Statute of Fines contains two parts.

The first, to barr those which have present right, and they ought to make their claim within five yeares after the Fine levied, or otherwise they shall be barred.

And the second those which have Right, title, or interest accrued, after the Fine levied, by reason of any matter which preceded the Fine, and in both cases the Estate which is barred ought to be

turned into a right, or otherwise it shall not be barred, the which cannot be here, for the estate is given by the Custome, and it is to have his beginning after the Death of the first Tenant, and though that the first Tenant commit Forfeiture, yet he in remainder cannot enter, for his time is not yet come, as in 45 Ed. 3. is a collaterall Lease with warranty to the Tenant for life in possession, this shall not be a barr, insomuch that it is made to him which hath possession, so if a man make a Feoffment upon condition, and the Feoffee levy a Fine with proclamations and five yeares passe, and the condition is broken, the Feoffee may enter at any time, otherwise if the Fine had been levied after the condition broken, and so if the Lord be intitled to have *Cessavit*, and Fine is levied by the Tenant and five yeares passe, he shall be barred, and this was the cause of the Judgment in *Saffins* case, insomuch as the Lessee had present interest to enter, and this was altered into a Right by the Feoffment, and then the Fine was a Barr, but here he in Remainder hath no right till after the Death of him which was the first Tenant, and then his right to the possession begins, and then if a Fine had been levied with proclamation this shall be a Barr, and so he concluded, that Judgment should be entered for the Plaintiffe.

Coke.

*Coke* cheife Justice accordingly, and he agreed also that the sole question is, if by acceptance of a Bargaine and sale by the first Tenant for life, the Remainder be turned into a right, and he sayd, that right sometimes sleepeth, but it never dyes, but this shall be intended (the right of the Law) and not right of Land, for that may be barred by Writ of Right at the Common Law, and he intended that Copy-holdes are within the Statutes of Fines, be they Copyhold for life, yeares, in tayl, or in fee, for the third part of the Realme is in Copy-holdes, and two parts in Lease for yeares, and if these shall not be within the Statute, then this doth not extend to three parts of the Realme, and it is agreed in *Heydons* case 3 *Coke* 8. a. That when an act of Parliament doth not alter the Tenure, Service, Interest of Land, or other thing in prejudice of the Lord or of the custome of the Mannor, or in prejudice of the Tenant, there the generall words of such act of Parliament shall extend to Copyholds, and also it is resolved to be within the Statute of 32 H. 8. Of Maintenance, and also it is within the expresse Letter of this, which contains the word Interest, and Copy-holder hath interest and so also of Tenant by Statute Merchant, then the question will be, if the acceptance of a Bargaine and sale turnes that to a right, and he intended that his Estate for life remaines, though that it is only passive in acceptance of Bargain and sale, and for that it shall not be prejudice more then if Tenant at will accepts a Bargaine and Sale, for his Estate at will, this notwithstanding remaines, but if Lessee  
for

for years or life, accepts a Fine upon conuſance of right, this is a forfeiture, inſomuch that it is a matter of record, and it ſhall be arreſt-ſtoppel to ſay that he did not take Fee by that, & doth not admit the Reuerſion to be in another, alſo inſomuch that the Bargain and ſale was executed by the Statute for this cauſe it ſhall not be prejudice, as it was adjudged in the Lady *Greshams* caſe in the Exchequer, 28 *Eliz.* Where two ſeverall conveyances were made with power of Revocation upon tender of ten pound, and adjudged by act of Parliament that a revocation was good, and alſo that no liſenſe of alienation ſhall be made, inſomuch that it was by act of Parliament, which doth no wrong, and it is for the Treſpaſſe, for which the party ought to have liſenſe, and if it be not Treſpaſſe there need no liſenſe before hand nor pardon afterwards: So if a man makes a Leaſe for yeares, remainder for yeares, the firſt Leſſee accepts Bargaine and Sale, this ſhall not turn theſe in remainder to prejudice.

*Revocation of  
uſes.*

Thirdly it ſeemes to him alſo, that notwithstanding the acceptance of the Bargain and Sale, the firſt Copy-hold Eſtate for life remains in *Eſſe*, and is not determined. For this differs from an Eſtate of Land, for it ſhall not be ſubject to a Rent granted by the Lord: the firſt Eſtate remaines, till all the remainders are determined, for the firſt tenant for life cannot ſurrender to the Lord, alſo it is customary eſtate, for by the Common Law this being granted to three ſucceſſively, this ſhall be determined and extinct for the third part, for they three take into poſſeſſion, and the word ſucceſſively, ſhall be taken as void, but here the Cuſtome appoints, that the remainder ſhall not have his beginning, till the death of the firſt Tenant, and that they ſhould take by ſucceſſion, and for that there is a difference between this customary Eſtate, and other Eſtates at the Common Law; and other ſurrenders, for if a Copy-holder ſurrender to the uſe of another for life; nothing paſſeth but for life only, the Lord hath not any remainder by this Surrender, and if this Tenant for life commits forfeiture, he in reuerſion ſhall not take advantage of that, and if at the Common Law Tenant for life, remainder for life, or in fee be, and the firſt Tenant for life makes a Feoffment, and after levies a Fine, and reſolved that he in reuerſion ſhould not be bound till 5. yeares are incurred after the death of the 1. Tenant for life, for then his title of Entry firſt accrues in apparancy, and before that is in ſecrecy, of which he in remainder is not held to take notice, and ſo in this caſe he in remainder ſhall not be bound till five yeares are incurred after the death of the firſt Tenant, and the rather inſomuch as the firſt Eſtate remaines, for that that the firſt Tenant was only paſſive and not active, and ſo he concluded that Judgement ſhall be given for the Plaintiff, inſomuch that the Fine was no Bar, and  
upon.



upon this concordance of all the three Justices in opinion, no other Justices being present this *Term* Judgment was entered accordingly.

*Rasche* 26 12. 10. Jacobi, in the Common Bench.

*Danyell Waters against the Deane and chapter of Norwich.*

**I**N covenant, The case was this in 37 H. 8. the then Deane and Chapter of *Norwich* made a Lease to one *Twaits* for fifty yeares, which ended 35 *Eliz.* in time of *Ed. 6.* The then Dean and Chapter surrendred all their possessions to the King, which those newly endowed, and incorporated by the name of Deane and Chapter of the foundation of *Ed. 6.* and in the 8. *Eliz. Salisbury* then Deane and the then Chapter made a Lease to *Thimblethorpe* for 99. yeares to begin after the said Lease for fifty yeares made to *Twaits*: And it doth not appeare by the pleading; that *Thimblethorpe* entred: But the succeeding Deane and Chapter in the 42. *Eliz.* made another Lease to *Waters* the Plaintiff for three lives, rendring the ancient Rent quarterly; with warrant of Attorney to make livery, and it was not executed till after the end of three quarters of a yeare after the Sealing of it, and when the time of three rent daies were incurred: And in this Lease the Deane and Chapter covenanted with *Waters* to acquit and save harmelesse the Lessee and the premises during the *Term*, &c. By reason of any Lease made by them, or any of their Predecessors or by the Bishop: And then the Plaintiff in his Court, conveys the Lease made by *Thimblethorpe* to *Doylye*, and that he intered and disturbed the Plaintiff, and so assigned breach of covenant, upon which this Action was founded, upon which the Defendants demurr in Law: And this was agreed by *Dodridge* the Kings Serjeant for the Defendants.

*Dodridge.*

First that the Lease made to *Waters* was void, and then the Covenants do not extend to charge the Defendants: And he supposed the Lease to be void, insomuch that the Attorney did not make Livery; untill three Rent daies were incurred, and the Lease was made as well for the benefit of the Lessor, as for the Lessee, for if the Lessee is to have the profits and the Lessor is to have the Rent: And insomuch that the Livery was not made before a Rent incurred, this tends to the prejudice of the Lessor, and for that the Authority is countermanded, and the Livery made after void, for when a man hath a Letter of Attorney to make Livery, he ought to make that in such manner, as the Feoffer himselfe would make it, and the Lessor cannot make that after a rent incurred, for then he should loose that Rent: Also Authority ought to be strictly pursued, as in 36. H. 8. *Dyer* 62. 24. Letter of Attorney was made to three joyntly

joynly and severally to make Livery, and received that two cannot do it, see 11. *H. 4.* For it ought to be made joynly or severally, so here the Attorney ought to make the Livery as his Master will, and that ought to be made before any Rent incurred: And for this cause he intended the Lease to be void: And then as to a Collaterall Covenant, which is in effect no other, but that the Plaintiff shall enjoy the Land during the Tearme, which is of an Estate which is nothing, for if the Lease be void, the Estate is nothing, and the Lessee hath not any Tearme or Estate in the Land: And he agreed that in the Record of *Chedingtons Case*, 1 *Coke* 153. *b.* And in the Commentaries, *Wrotleys Case* 198. And 2. *Eliz. Dyer* 178. There is a difference betweene *Tirminum Annorum*, and the time or space of yeares, or the life of such a man, but there is not any difference between a Tearme and an Estate: Also he supposed that the words of the Covenant extend only to save the Plaintiff harmless of Leases made by these Defendants or any of their predecessors, and this Lease was made to *Twaits* in time of *H. 8.* Which was before their Corporation, for they have been but named a Corporation in the time of *Edward 6.* and not before: And then a Lease made in the time of *H. 8.* is not made by them nor by their Predecessors, and so the Covenant doth not extend to that, as it appears by 8. *Ed. 4.* in case of prescription, if Corporation be changed in manner and forme, and the substance of their name remaine, yet they ought to make speciall prescription, then *a fortiori* in this case, where the substance is changed; and so he concluded, and prayed Judgement for the Defendants.

*Nicholls.*

*Nichols* Serjeant for the first argued, that the Livrey was well made, for these Defendants shall be intended Occupiers, and to have the profits of the Land till the Lessee entred or they waved the possession, and so no prejudice, and the Lessee shall not be charged with Rent till he entres, or the Lessor wave the possession, as it was resolved in *Bracebridges Case Com.* 423. *b.* and in the Deane and Chapter of *Canterburies Case* there cited: And for that the Livery shall be good, and the Lessor not prejudiced by the deferring of it, and then to the second, that is the Covenant, he agreed that if the Estate be created, and Covenant in Law annexed to it, if the Estate cease, the Covenant also shall cease: But if expresse Covenant be annexed, then the Covenantor ought to have regard to performe it, or otherwise an Action of Covenant lies against him, notwithstanding that the Estate be avoided: But here he intends it against him notwithstanding that the Estate be void: But here he intends the Estate continues till *Thimblashorp* entred: But admitting that he had entred, yet the covenant shall bind the Covenantor, as in 12. *H. 4. 5. a.* Parson makes a Lease for yeares, and after is removed;

an

Dodridge.

an Action of covenant lies against him, and 47. *Ed.* 3. and 3. *Ed.* 3. If Tenant in fee, makes a Lease with expresse covenant and dies, and the Issue outs the Lessee, the Lessee shall have an Action of Covenant against the Executors of the Tenant in tail, and 9. *Eliz.* *Dyer* 257. 13. Tenant for life, the Remainder over in Fee, by Indenture makes a Lease, without any expresse covenant and dies, Lessee cannot have an Action of covenant against his Executors, otherwise (if there had been an expresse covenant. See the booke and many Authorities there cited to this purpose, and also he cited one *Rawlinsons* Case to be here adjudged, that if a man which hath nothing in land makes a Lease, and an expresse covenant for the enjoying of that, if he which hath right enters, by which the covenant is broken, Action of covenant lies upon the expresse covenant: So that admitting that the Lease is void, yet the covenant is good and shall bind the successors; and so he concluded, and praised Judgement for the Plaintiff, and this case was argued at another day by *Dodridge* the Kings Serjeant, by speciall appointment of the Judges, and now he supposed, that the Court contains that the same Dean & Chapter which made the lease to *Twaits* in 37 *H.* 8. also made the Lease to *Thimblethorp* in the 18 *Eliz.* which cannot be, inasmuch that the corporation was changed in the time of *E.* 6. & for that cannot be the same Deane and Chapter, for if a Prior Covent be translated into a Dean and Chapter, and the Dean and Chapter will make prescription, they ought to make that in speciall manner, and not generally as Deane and Chapter, as it is resolved 39. *H.* 6. 14. 15. and in 7. *Ed.* 4. 32. In Trespasse against the Abbot of *Bermondsey*, it is agreed that the Prior was not Predecessor to the Abbot, as it appears by 10. and 11. *Eliz.* *Dyer* 280. 11, 12, 13. That the Deane and Chapter of *Norwich* made a surrender in the time of *Ed.* 6. and then newly incorporate, so that he which made to *Twaits* in the 37. *H.* 8. could not be Predecessor to the Deane and Chapter which made to *Thimblethorp* in 18. of *Eliz.* for he could not then be any Predecessor, and for that the Lease to *Thimblethorp* void, and then there is no Eviction, but wrong to the Plaintiff, for which he may have an Action of Trespasse, and then he cannot have an Action of covenant, as it appears by 22. *H.* 6. against the Lessor: But admitting that the Lease to *Thimblethorp* were good, then this hath his beginning in the 38. of *Eliz.* and makes the Lease for three lives to the Plaintiff void by the Statute of 13. *Eliz.* inasmuch that the aforesaid Lease for yeares was then in beginning, and the Statute is expressly that it shall be void, as the grant of next avoidance of a Church in the case of the Bishop of *Lichfeild* and *Coventry* against *Sale* cited in *Lincolne Colledge* Case 3. *Coke*, as if a Parson makes a Lease for yeares, and

is Non-resident, the Lease is void by the *Statute* against the Parson himselfe, and then if the Estate be void, all covenants which depend upon that are also void: Also he supposed that there is not any good conveyance of the estate of *Thimblethorp* to *Doyley*, which is intended to be the disturber to make the *Covenant* to be broken; and then when *Doyley* entered without title, the *Covenant* cannot be broken, and so he concluded, and prayed Judgement for the *Defendants*.

*Nichols* Serjeant for the *Plaintiff* agreed, that if there be an alteration of *Corporation*, and title is to be made by prescription, it ought to be so specially shewed as it hath been said of the other part by *Dodridg*. But here it is not so, for the same *Dean* and *Chapter* which made the Lease to the *Plaintiff*, made the Lease to *Thimblethorp*, and this appears by the pleading; and the Lease made to *Twaits* is not mentioned, but only to shew the beginning of the Lease to *Thimblethorp*: And then the *Deane* and *Chapter* which made the Lease in 18 of *Eliz.* to *Thimblethorp*, were the same *Deane* and *Chapter* which made the Lease in 42. *Eliz.* to *Walters*. And hee supposed the *Covenant* being expressed, this remains; otherwise if it had been a *Covenant* created only by the Law, as it appears by the Books of 9. *Eliz.* *Dyer*, 257. 13. and 32 *H.* 6. 32. And also when a *Covenant* is created by Law, the *Covenantee* cannot have *Covenant*, if he be not outed by one which hath title, 26 *H.* 8. 36. otherwise of expresse *Covenant*, as it is agreed in the 12 *H.* 4. 5. So in 47. *Edw.* 3. *Covenant* lies against *Executors*: and 38 *Edw.* 3. *Covenant* lyes against *Heir* being made by *Tenant* in *tail*, if the *Lessee* be outed after his death; and so hee concluded, and prayed Judgement for the *Plaintiffe*.

*Nichols.*

*Wynch* Justice supposed that Judgement should be given for the *Plaintiff*, and that he had good cause of action; and he intended that the *Livery* and *Seisin* by the *Attorney*, after *Rent* incurred, was good. Secondly, That the *Covenant* shall extend to the Lease made to *Thimblethorp*; for it doth not appeare, but that it is the same *Deane* and *Chapter*, which was in time of *H.* 8. For it is not pleaded that it was founded by *Ed.* 6. but had his name by him. And also it is confessed by the *Demurrer*, that it is the same *Deane* and *Chapter*, but admitting that it is not, yet it may be answered, as it hath been by *Nichols* before, that is, that the *Deane* and *Chapter* which made the Lease in 8 of *Eliz.* to *Thimblethorp*, is the *Deane* and *Chapter* which made the Lease to the *Plaintiff* in the 42 of *Eliz.* are all one: and the Lease to *Twaits* is shewed only, to shew the beginning of the Lease made to *Thimblethorp*. Also he supposed the conveyance of *Thimblethorps* Estate to *Doyley* to be good; and it doth not appear but that the *Deane* and *Chapter* were in possession at the time of the making of the Lease

*Wynch.*



for 3 lives : So that this hath a good beginning, and continued till it was avoyded by the Entry of the succeeding *Dean*, for this remains good against the *Deane* that made it : But *Thimblethorp* also may avoid it during his *Tearm*, and now here is eviction by the Assignee of *Thimblethorp*, before that the Lease be avoyded by the succeeding *Deane* and *Chapter*, where the *Deane* himselfe could not avoid it, for he is the party which made it : Also here is expresse warranty against the Lease made to *Thimblethorp*, and for that also action of *Covenant* lyes, otherwise if it had been only warranty in Law, as if Lessee for life had made a lease for years, and dyed : Upon the covenant in Law action doth not lye, for the Law doth not constrain to Impossibilities, as in the 40. *Ed.* 3. *Covenant* that the wind shall not peirce nor break the Trees : and 2 *Ed.* 4. 12 *Ed.* 4. Action of *Covenant* lies upon expresse *Covenant*, though that a stranger enters without title, and he cyted one *Dormans* case to be adjudged, that where a man borrows money upon a usurious contract, and the Principall gives security to the Surety that was bound with him by collaterall Obligation : and the Surety being arrested, takes advantage of the Counterbond, notwithstanding that the principall Obligation was void by the Statute of Usury. So here, notwithstanding that the estate was void, and that is the principall : Yet the *Covenant* being expressed, and collaterall, shall bind the Lessor, and so he concluded that Judgment shall be given for the *Plaintiff*.

*Warburton.*

*Warburton* Justice to the contrary, and yet he agreed that the livery was good, notwithstanding that it was made by the Attorney, after three Rent dayes incurred, and he seemed that it might be made at any time during the *tearm* and the lives of the parties. And also he agreed that the Corporation shall be intended the same Corporation, and yet Corporation had no *Predecessor* nor *Successor* : but the Statutes say, *Predecessors*, *Antecessors*, and *Progenitors* of the King, as 39 *H.* 6. 7 *Ed.* 4. 2 *H.* 6. But he did not insist upon that, but agreed that : But the matter upon which he insisted, was, that the Lease to the *Plaintiff* was void against the succeeding *Deane* and *Chapter*, inso much that the lease to *Thimblethorp* was in *Esse* at the time of the making of that, and this by the Statute of 13 *Eliz.* And it appears that the *Deane* which made the Lease to the *Plaintiff* is dead, for he is named in the Count, the late *Deane* ; and then when the *Covenants* depend upon the estate, be they expressed, or in Law, these determin and end with the estate, as in *Lemons* case, 28 *H.* 8. *Dyer* 28. 189. resolved, that where the statute of 21 *H.* 8. makes Leases being in the hands of Spirituall persons void, this avoids these *Covenants* also which depend upon the Lease. So if a Parson make a Lease and *Covenant* that he will not be non-resident, and binds himselfe for the performance of that, if the *Covenants* be released, the Obligation also is released.



released. So if the Lease be avoyded, the Covenants also are avoyded: And as an action of Covenant doth not lye for the not injoying of Land after a surrender, so Covenant doth not lye after the estate is avoyded, see 4 H. 7. And to the case put by *Wynch* of counterbond, where the Principall was void by the *Statute* of Usury: he said that there the Obligation was not void, but voidable by plea. But here it is, the estate is made void by the exprels words of the *Salute*: and he intended that this difference between expresse Covenant, and Covenant in Law, but that the one determines with the estate as well as the other, and yet he agreed that expresse Covenant shall extend to charge the *Covenanter* upon Entry by a stranger, which hath no title; but yet this doth not charge the *Lessor* after the estate determined, and so he concluded that Judgment ought to be given for the *Plaintiff*.

*Coke* cheif Justice accorded with *Wynch* that Judgment shall be given for the *Plaintiff*: And he supposed that the livery was well executed by the *Attorney* after the 3 Rent dayes incurred: and yet he agreed that it had been a probable objection made against that: But he supposed that the *Lessor* was not prejudiced, insomuch that the Law intends that they had the possession and the profits of the Land till livery made, and the *Attorney* is only as a servant to the *Lessor*: And he said, that this is not like to *Cromwells* and *Andrews* Case, of grant of a Minnor upon Condition to re-grant Advowson or Rent, in which cases the Advowson or Rent ought to be re-granted, before that the Church becommeth void, or the Rent day be incurred, insomuch that they are followers of the thing granted, notwithstanding that the *Fooffee* hath time during his life to make the re-grant, if it be not hastned upon Request. 2. He supposed that the expresse Covenant shall bind the *Lessor*, though it be referred to the term; for term includes Estate and Interest, but this is when it is Term; but when it is no Estate, then it shall be intended during the continuance of the years, as it appears by the Rector of *Chedingtons* Case: and this he held clear, and so of promise also, as if a man makes a Lease for years, and before that the *Lessee* enters, makes a lease to another, and promises that the second *Lessee* shall enjoy during the term, if the first *Lessee* enter, the second *Lessee* may have an action upon the promise, and he said that it was adjudged in the *Kings Bench*, Hill. 35 *Eliz.* between *Foster* and *Wilson*, Plaintiffs, and *Mayer*, Defendant; where the case was, A man made a Lease of a Rectory for years, and covenanted with the *Lessee* to save him harmlesse against one *Blunt* Parson of *Dole*, which entered and outed the *Lessee*, which brought Covenant against the *Lessor*, and resolved that it lyes notwithstanding that it doth not appear whether he had Interest or no: So that be the Lease good or void: yet when there is an Eviction, Co-

[*Coke*]

*tenant* lyes, though the Lease be originally void, yet till it be avoided, it shall be intended a good Lease: And if a Covenant of Dean and Chapter doe not bind them, none will take Lease of them, so they shall be compellable to plow the Land themselves, and also he supposed that the Lease was good against the succeeding Dean and Chapter, till it be avoyded by Entry, as it was adjudged, *Trin. 30 Eliz.* between *Elmer* and *Page*, where a Bishop made a Lease for years, and dyes, the Successor makes a Lease for 3 lives, the Lease for years not determined: And it was resolved that the Lease for 3 lives was void, notwithstanding that the Bishop might make a concurrant Lease for years, which is not made void by the Statute of 1 *Eliz.* inasmuch that the Statute is in the definitive, that is, Leases for 3 lives, or 21 years, and so they cannot make both, for then the Lessee for life should have the Rent reserved upon the Lease for years, which is settled in the Lessee for 3 lives, by the regrest of the Lessee for years: and so he said also, notwithstanding that the statute of 18 *Eliz.* made void all Leases made by Deane and Chapters, where there are more then 3 years in being; he agreed that a Lease for years, where there are so many years in being is good: but if there be but two years in being, that makes the Lease for life void. And he agreed that notwithstanding the statute, yet any Lease shall be good against the Deane himselfe, inasmuch that he is party to that, and hath a negative voyce in the making of that: And he seemed that the Proviso in the statute of 18 *Eliz.* did not extend to Leases in possession, but to Leases in reversion, which are dormant, of which a stranger cannot take notice, inasmuch that they are invisible; and for that, if a Dean and Chapter procure surrenders of them, and within 3 years, that shall make another Lease good, and so they shall save their Covenant, and for that the Lease here made to the Plaintiff had been good, if the Defendants had procured the Lease made to *Thimblethorp* to be surrendred within 3 years after the taking of that. Also he cyted the Case betwixt the Bishop of *Lychfield* and *Coventry*, and *Sale* to be adjudged, *Michaelmas 32. and 33. Eliz.* That a grant of the next avoydance is good against a Bishop himself that granted it, and not made void by the Statute of 1 *Eliz.* as to him, but to all Successors only. And so in this case he said, they all agreed that the Lease was not void which is made to *Waters* against the Deane himself which made it, but only against the Successor. And he said also, Covenant in Law extends to lawfull *Evictions*, and to estates in being, and not where an estate is determined, as if Lessee for life makes a Lease for years, and dyes, the Lessee shall not have an action of Covenant upon Covenant in Law, as it is agreed in 9 *Eliz. Dyer*, and 38 *H. 6.* before cyted. So also he supposed to expreis reall Covenants which extends to *Free-hold*, or *Inheritance*, as Warrant and Delend, upon which

which a man cannot have an action, if he be not outed by one which hath title; and as in 3 *Edw.* 3. 7. and 21. A man makes a *Feoffment* with warranty, *non feoffavit*, is a good Plea; for if the *Feoffment* be avoided, the *Warranty* also is avoided, for that depends upon the *Feoffment*. But if a man makes a *Lease* for years, and covenants that he will warrant and defend the Land to the *Lessee*, if the *Lessee* be outed by one which hath title, or without title, he may have an action of *Covenant*, for the *Lessor* hath the Evidences, and ought to defend the possession of his *Lessee*, and the right also, and damages are only to be recovered; and so is the difference between a *Lease* and *Inheritance*, though that the words of the *Covenant* are all one. And also he said that it may be objected, that the Incorporation (was not well pleaded) by *Edw.* 6. Inasmuch that he doth not say after the Conquest, for *Ed.* 3. was *Ed.* 6. in truth, for there were 3 *Edwards* before the Conquest, and he was the third after: And he saith that he hath known many exceptions to be taken to that, but hath not known any of them to be allowed, and for that he will not insist upon it. But the principal matter upon which he insists, was, that it doth not appear by the pleading, that the *Deane* which made the *Lease* was dead: and it appears by the pleading, that he entered in 4 *Jacobi* and was seised, and then of necessity ought to be living; and such averment of his life is sufficient, as it is agreed in the 13 *Eliz.* *Dyer*, where a Parson made a *Lease* for years, and the *Lessee* brought an *Ejectione firme*, and in pleading it was said; that the Parson is seised of the reversion, and this was allowed to be good without other averment of his life, for he cannot be seised if he be not living: and then if the *Deane* shall be intended to be living, then they all agreed that the *Lease* shall be good against him; for it was adjudged in this Court between *Blackeleech* and *Smal*, that if a Bishop makes a *Lease* for years, and after makes a *Lease* for life, the *Lease* for years being in *Esse*, and dyes, and the Successor accepts Rent, this shall bind him: and by this it appears that the *Lease* was good against the *Dean* himself which made it, and also against the Successor, till he enter and avoid it, and then by consequence the action of *Covenant* shall be very well maintainable, and so he concluded also that Judgment should be given for the *Plaintiff*, which was done accordingly.

*Pasche*, 1612. 10. *Jacobi*, in the *Common Bench*.

*Browning* against *Strelley*.

**M***ichael.* 2 *Jac.* Rot. 531. In debt, the Margent of the Count contains *Nottingham*, and the Count it self contains that the Obligation

gation was made at the Town of *Nottingham*, which is a County of it self, and the *Defendant* pleads *non est factum*, and the view was of the Town of *Nottingham*, and it was tryed by the Jury of the County of *Nottingham*, and this was moved in arrest of Judgment after verdict for the *Plaintiff*, by *Nichols* Serjeant. And it was agreed by all the Justices, that Judgment shall be given accordingly to the *verdict*, inso-much that notwithstanding that the Town of *Nottingham* is a County of it self, yet it may be that some part of the Town may be within the County, and for that possibility they would not arrest the Judgment.

*Ireland against Smith.*

**I**N action upon the Case for these words, the *Plaintiff* counts that he was, and is Proctor in the *Arches*: and in communication between one *Morgat* and the *Defendant* of him, the *Defendant* said to the said *Morgat*, You take part with *Ireland* against me, who is an arrant *Papist*, and hath a Pardon from the *Pope*, and can help you to such an one if you will: And after *verdict* it was moved by *Hutton* Serjeant in arrest of Judgment, that the action doth not lye; and he saith, that it hath been adjudged in this Court, 3 *Jacobi*, Rot. 7031. between *Kingstone* and *Hall*, that an action doth not lye for like words, he is an arrant *Papist*: And it were good that he and all such as he is were hanged, for he and all such as he is would have the Crowne from the Kings head if they durst: And it was adjudged that an action doth not lye for these words, which are more strong then the words in this action: but of the other part it was said by *Haughton* Serjeant that he did not insist upon these words, that he is a *Papist*, but that he had obtained a Pardon from the *Pope*, the which by the *Statute* of 13 *Eliz.* is made High Treason, and then notwithstanding that no time was limited when the Pardon should be procured, that is before the *Statute* or after, yet it shall be intended such a Pardon which is against the *Statute*; for the presumption of the Law shall be taken in the worst sense, and not like to the Case, where a man saith to another, that he hath the *Pox*: And also it is alledged by the Count, that the *Plaintiffe* is not above the age of 40. years, so that he cannot obtain a Pardon before the *Statute* of 13 *Eliz.* And for that he supposed that the action is very well maintainable. *Coke* cheif Justice said, that it was adjudged in the *Kings Bench* in the time of *Catlyn* cheife Justice there; that an action upon the Case doth not lye for calling a man *Papist*. And *Winch* Justice said, that if a man call a *Bishop* or another man which is trusted with government of the Church, and Ecclesiastical causes, that he thought the action lyes, otherwise not. Also he supposed that the Pardon might be for *Purgatory*, or other matters which are not within the *Statute* of 13 *Eliz.* And also the Pardon

Pardon may be procured by another, and come to his hands by delivery over afterwards that it had passed two or three, and the averment is not sufficient, for it is onely Implication and Inference, *Coke and Warberton* Justices sayd, that a Papist is one that errs in his opinion, and though that the Papists are Authors of many Treasons, yet the Law doth not intend so, and so of Heretick, which is alwaies in a fundamentall point of Religion, and yet an action doth not ly for calling a man Heretick, also the Pope is a temporall Prince in *Italy*, and for this cause also may pardon, and this is out of the statute of 13 *Eliz.* and so they all agreed that the Action doth not ly for these words.

Pasche 1612. 10 Jacobi, *In the Common Bench.*

*Marstones Case.*

**I**N a common Recovery the Tenant appears by Attorney, and vouches one which is present in Court, which appears, and vouches the common Vouchee, and the Attorney hath a Warrant of the party acknowledged before a Judge, but this was not entred of record, and this was in *Hilary* tearme 16 *Eliz.* And it was moved by *Dodridge* the Kings Serjeant, that the Warrant of Attorney might be now amended and entred upon the record, and *Coke* supposed cleerly that it shall not be entred, insomuch that it is a want of a Warrant of Attorney, but if there had been a mis-construing of the Warrant of Attorney, otherwise it is, for this seems to be within the Statute of 27 *Eliz. Chapter 5.* Concerning amendments.

*Common Recovery.*

In Debt upon an obligation with condition to perform Covenants in an Indenture of Lease the Defendant pleads, that after and before the originall purchased, the Indenture was by the assent of the Plaintiff, and the Defendant cancelled and avoyded, and so demands Judgment if action, and it seemes by *Coke* cleerly, that the Plea is not good without averment that no Covenant was broken before the cancelling of the Indenture.

*Obligation to performe Covenants.*

Pasch. 12. Jacobi, 1612. *In the Common Bench.*

*Parde against Stubbing.*

**I**T was moved in arrest of Judgment, that the *Venire facias* wants these words, *Et habeas ibidem nemina Juratorum*, but the words, *Venire facias duodecim, &c.* were incerted, and it seems by all the Justices that it was good, and that the first words,

*Arrest of Judgment*



words, are supplied in the last, and they are aided by the *statutes of Jeofai es*, after verdict, and so it was adjourned.

*Audita querela.*

In *Audita querela* sued by the sureties upon an escape made by the principall, they being in execution offered to bring the Money into the Court, or to put in sufficient Sureties to the Court, and so prayed that they might be bayled, and it was agreed, that if *Audita querela* be groudned by specialty or other matter in writing, or upon matter of Record, *Superfedeas* shall be granted before that the party be in Execution, and if he be in execution he shall be bayled, but if it be founded upon a matter in Deed, which is only surmise, he shall not have *Superfedeas* in one case, nor shall be bayled in the other case, and so was the Opinion of all the Justices.

*Wast.*

In an Action of Waste for digging of earth to make Brick, Estreprement was awarded, and upon *Affidavit*; that the Writ of Estreprement was delivered to the Sheriff, and that he gave notice of that to the party, and he notwithstanding that continues to make waste, attachment was awarded.

*Estreprement awarded.*

Pasch. 12 Iacobi, 1612. In the Common Bench.

Fetherstones Case, Trinity 1612.

*Ejectione firme. Refusall.*

IN *Ejectione firme*, The Plaintiff had Judgment, and an *Habere facias possessionem*, to the Sheriff of Coventry, which returns that he had offered possession to the Plaintiff, and he refused to accept it, and it seems that the Plaintiff cannot have *Habere facias possessionem*, inasmuch that it appears by the Record, that he hath refused to have the possession.

*Lord of a Mannor inclose the Demesnes adjoining to the Common.*

The case was, A Dean and Chapter being Lord of a Mannor, parcell of the Demesnes of the Mannor being severall, adjoynd to the Common, which was parcell of the wast of the Mannor, and one Copy-holder which had Common in the sayd Wast, puts his Beasts into the sayd waste to take his Common, and they for default of inclosure escape into the sayd Demesnes, by which the Lord brings his action of Trespas, and upon this the Defendant pleads the speciall matter, and that the Lord, and all those whose Estate he had, in the said place where the trespas is supposed to be made, have used to fence the said place which is parcell of the Demesnes of the sayd Mannor, against the Commoners which have Common in the sayd Common, being parcell of the waste, and also of the demesnes of the sayd Mannor, and that the Beasts of the sayd Defendant, escaped into the sayd place in which, &c for default of inclosure, and so demands Judgment, upon which the Plaintiff demurs in Law: In the agreement of which, it was agreed by Hutton and Raughton

*Haughton* the Serjeants which argued it, whether a man by prescription, is bound to make fence against Commoners, as it is agreed in the 22 H. 6. 7. 8. 21 H. 6. 33. But the doubt which was made in this case by *Haughton* which demurred was, for that that the Lord which by the prescription ought to inclose is owner of the soyle also, against which he ought to inclose, and so he ought to inclose against himself, and for that he supposed that the pleading should have been, that there is such a custome there, and of time out of minde that the Lord shall inclose against the Common, insomuch that by that the Copy-holder would bind the Lord, and upon that it was adjourned, &c.

Pasch 12 Jacobi, 1612. In the Common Bench.

Sir Henry Rowles against Sir Robert Osborne and  
Margeret his Wife.

**I**N *Warrantia Charte*, the case was, Sir Robert Osborne and his Wife levied a Fine of the Mannor of *Kelmersb*, with other Lands in *Kelmersb*, to Sir Henry Rowles, against all persons, and this is declared for the Lands in *Kelmersb* to be to the use of Sir Henry Rowles for life, with diverse Remainders over, and for the Mannor no use was pleaded to be declared at all, and then a Writ of Entry in the *Post* was sued against the sayd Sir Henry Rowles which vouched Sir Robert Osborne, and his sayd wife, and this was declared for the sayd Lands to be to the use of the sayd Sir Henry Rowles for his life with other Remainders over, which were declared upon the Fine of the Lands in *Kelmersb* only, and of the Mannor of *Kelmersb* no uses were declared, upon the Recovery also, and upon this Recovery pleaded in barr the Plaintiffe demurred, and it was argued by *Dodridge* Serjeant of the King for the Plaintiffe, that the Plea in Barr was not good, insomuch that it doth not appeare that the warranty which was executed by the Recovery was the same warranty which was created by the Fine, and also the Fine was taken for assurance against the Issue in taylor, and the Recovery to Barr the remainders, and so one shall not destroy the other, and for the first he sayd, that a man may have of another severall warranties, and severall causes of Voucher and all shall be together, for warranty is but Covenant reall, and as well as a man may have severall Covenants for personall things, as well he may have severall reall Covenants for one self same Land, as if the Father infeoff one with warranty, and the Sonn also releases to the same Feoffee with warranty, or if the Father infeoff one with warranty against him and his Heires and the Sonn release with warranty against all men, the Feoffee may

*Warrantia  
Charte.*

*Dodridge.*

vouch one, and *Rebut* against the other, so of Warranty of Tenant in taylor and release of an Ancestor collaterall with warranty in Law, and expresse warranty, as it is agreed in 31. *Ed. 1. Fitzh. Voucher* 289. And upon that he concluded that a man may have severall warranties of one selfe same man, and the one may be executed and the other remaine, notwithstanding that it be for one selfe same Land, and he supposed the effect of these warranties are as they are used, for if that may vouch generally, and bind himselfe upon the Fine or upon his owne warranty, or upon the warranty of his Ancestor, notwithstanding that the voucher be generally, as it is 31. *Ed. 3. Warranty of Charters* 22. So if he be vouched as Heire, though that it were speciall, but if he be Heire within age otherwise it is, for that is a good Counter Plea that he was within age, and so praied (that the word might demur) during his nonage, 17. *Ed. 2. Counter Plea of voucher* 111. 21. *Ed. 4. 71.* Then he supposed here was generall warranty which is executed, and also another warranty which remaines, notwithstanding any thing which appears to the Court, for he hath not demanded any binding, 10. *Ed. 3. 15. a. b.* Also the warranty in the Fine is the warranty of all the Conusees, and the warranty upon which the voucher is, is only the warranty of Sir Robert Osborne, which cannot be intended the same warranty which is contained in the Fine which is by two, as it is resolved in 10. *Ed. 3. 52.* But admitting that it agrees in all, that is the voucher and the warranty in the Fine, that is, in number of persons and quantity of land and all other circumstances, yet it shall be no Barr, for the Common Recovery is only as further assurance, for it is for forfeiture if it be suffered by Tenant for life, as it is resolved in *Pelham's Case* 1. *Coke*: Also he supposed that notwithstanding that the Fine was levied hanging the Writ of entry, and to Sir Henry Rowles made Tenant, yet this is good being by purchase, but not if it be by descent or by recovery upon elder Title: And he supposed that if the recovery and the warranty might be together by any possible meanes, they shall not be destroyed, inso-much that this is the common case of assurance, and for that shall be taken, as in *Pattenham's Case* 4. and 5. *Phil. and Mary. Dyer* 157. and 2. *Coke. Cromwell's Case* 77. b. where a man makes a Feoffment upon condition rendring Rent, and after suffers common recovery, and yet this notwithstanding the condition and Rent remaines: And so it seemes that in this case the warranty remaines notwithstanding the Recovery; and so he concluded, and praied Judgement for the Plaintiff.

*Nicholls.*

*Nicholls* Serjeant for the Defendant, and he seemed that the warranty is destroyed, first inso-much that the Recovery was to other uses, and the Fine was when proved that there was no further

ther assurance, also he supposed, that inſomuch that it doth not appeare to what uſe the Recovery was for the Mannor of *Kelmerſh*, that for that it ſhall be intended to the uſe of Sir *Robert Osborne* himſelfe, and then for that alſo the warranty is diſtroied, inſomuch that part of the Land is re-aſſured to Sir *Robert Osborne*, as in 40. *Ed. 3.* 13. The Father enfeoffes the Son with warranty, which re-enfeoffes the Father, this deſtroies the warranty: So if they make partition by their owne Act, as it is agreed in the 34. *Ed. 3.* Alſo he ſuppoſed that the Tenancy in Sir *Henry Rowles* is diſtroied before that the Fine was Levied, inſomuch that this was Executed by voucher, and ſo he did not purchaſe hanging the Writ, for this is alſo conveyed from him by the Recovery in the value before that the Fine is levied, and it is all one with the caſe, where a man recovers upon good Title hanging a Writ, and he agreed, that the recovery had been for further aſſurance, that then it ſhall be as it hath been objected by the other party, and the warranty had remained, but this he ſuppoſeth, it was not, inſomuch it was to other uſes then the Fine was, and he intended that if the Eſtate to which the warranty is annexed be diſtroied, the warranty alſo ſhall be diſtroied, 19. *H. 6.* 59. 21. *H. 6.* 45. 22. *H. 6.* 22. and 27. So if the Eſtate be avoided the warranty is diſtroied, if it be by the Act of the parties named, alſo he ſuppoſed that the warranty is executed, and that it ſhall be intended the ſame tye upon which the warranty is created as it is 10. *Ed. 3.* 51. *Mauxells caſe* Com: if he demand no tye but enter generally into the warranty, there ſhall be execution of all warranties and ſhall bind all his rights, for otherwiſe all the Eſtates tayl cannot be bound by that: But where the (*Lien*) is demanded as where there are three ſeverall Eſtates tayl limited to one man, and upon voucher he enters generally into the warranty, all the tayles ſhall be bound, but if he demand the *Lien's* which he hath to bind him to warranty, there ſhall be a Barr of that only, upon which the voucher is, and the remedy is, that if he be impleaded by the party, that hath made the warranty, he ſhall be rebutted by his owne warranty: But if he be impleaded by a ſtranger he ſhall vouch him that warranted that, and if warranty be once executed by voucher and Recovery in value, though that the Land recoverd in value be a defeaſable Title, yet the party ſhall not vouch at another time by the ſame warranty, as it is 5. *Ed. 3.* *Fitz. voucher* 249. and 4. *Ed. 3.* 36. And for that in this caſe, inſomuch that the warranty was once executed, he ſhall not vouch againe upon the ſame warranty: Alſo it is not alledged in the Count that the Plaintiff was impleaded by Writ of Entry in the Poſt, but in the Per, in which he might have vouched, and ſo ſhall not have this Action, where he might have vouched: And alſo he

supposed that Sir Henry Rowles shall not have benefit by this warranty without praying aid of those in remainder, insomuch that he is but Tenant for life, but he supposed that it was no Remainder but reversion, for otherwise they are but as an Estate, and he may have advantage of the warranty, as it seemes without aid praying: But not where there is Tenant for life with the reversion expectant; And so he concluded, and praied Judgement for the Defendant: And he cited one *Barons Case*, where Tenant in tayl levies a Fine with warranty, and after suffers Recovery: And it was agreed by all the Justices, that yet the Recovery shall be a Barr to the Remainder, notwithstanding that the Estate tayl be altogether barred and extinct by the Fine, but *Coke* cheife Justice said; that *Wraye* cheife Justice would not suffer that to be argued, insomuch that it was of so great consequence being the common course of assurances: But it seemes that the Recovery shall not be a Barr for the Remainders for the causes aforesaid, and he said that he was of counsell in *Barons Case*, and thought this Objection to be unanswerable, and of this opinion continued.

*Pasche 1612. 10. Jacobi, in the Common Bench.*

Richard Lampitt against Margeret Starkey.

*Devise of a  
Lease.*

*Dodridge.*

**E**SECTION E *Firme* upon speciall verdict, the case was this, Lessee for five hundred yeares, devised that to his Father for life, the remainder and residue of that after the death of his father to his Sister, the Devisor dies, the Sister which hath a remainder takes a Husband, the Husband at the request of the Father grants release, and surrenders all his Right, Tearme, and Intrest, to the Father which had the Possession: And the question was; if by that the remainder of the Tearme should be extinct or not: And it was argued by *Dodridge* for the Plaintiff, that the remainder remains that notwithstanding, insomuch that this is a possibility only, which cannot be granted surrendered or released, and yet he agreed, that if Lessee for life grant or demise the land, all his Estate passeth without making of any particuler mention of it, as it is agreed in 10. *Eliz. Dyer*. And for that when the Lessee hath devised the Lands to his Father for his life, that which remains is only a possibility, for it doth not appeare for what yeares the Sister shall have it, and for that meerely uncertaine, 7. *Eliz. Dyer* 244. The King *Ed. 6.* appropriated a Church to the Bishop to take effect after the death of the present Incumbent, the Bishop after that makes a Lease for yeares to begin after the death of the Incumbent, and void for the uncertainty, for the Bishop hath no perfitt Estate, but



but future Interest, which is meerely impossibility, and with that agreed *Locrofts Case*, in the Rector of *Cheddingtons Case*, 1. *Coke* where Lessee for yeares makes assignement of so many of the yeares as shall be to come at the time of his death, and void for the uncertainty, insomuch that it is meerely possibility, for that which may be granted or surrendred; ought to be *Interesse Termini* at least: And he supposed it could not be released, insomuch that he to whom the release is made, hath all the Tearme if he lived so long; and so he concluded, and praied Judgement for the Plaintiff.

*Harris* Serjeant for the Defendant; argued that the first devisee had two Titles, one as Executor and another as a Legatee, and before entry, and after that he had entred also the Law doth adjudge him in as a Legatee, and before that he enter he may that grant over, notwithstanding that he hath not determined his Election, for the Law vests the property and possession of that in him; before any entry, but to make an election there ought to be some open Act done, as it is agreed in *Welden & Elingtons Case*, where that the first devisee which was Executor, also made expresse claime to have the Tearm as Legatee and not as Executor, and so vested the remainder also, see *Com. 519. b.* And so in *Paramore and Yardlies Case*, Lessee for yeares devises his Tearme to his Executor during his life to educate his Issues, the which the Executor doth accordingly, and this open act was resolved to be a good election, and in *Mannings case*, 8 *Coke* 94. *b.* The Executor which hath the 1. Estate devised to him, saith, that he to whom the Remainder was limited shall have it after his Death, and this resolved to be a good Execution and election, and it is there resolved, that such Election made by the particular Devisee is a good Execution for him in remainder, but here is not this Election to have this as Legatee nor Executor, for there is not any overt Act made by which this may be done.

Secondly he conceived that this is no remainder, but Executory devise, as it is agreed in *Mannings Case*, and that this may be done by Devise which cannot be done by the party by act Executed, and for that he conceived that there is no possibility, but an Estate Executed and vested in him which is Executor, though there be no election made nor Execution of the Legacy, and admitting that it is but a possibility, yet he conceived that it is *Propinqua possibilitas*, insomuch that the Tearme is longer, then it may be intended, that any man might live, insomuch that *Adam* lived but 950. yeares, and this is five thousand yeares, which is longer then any man in the world ever lived, and he said that it is agreed in *Fullwoods Case*; that possibility may be released to a possession, and with this agreed the opinion of *Strange*, in the 9. *H. 6.* 64. And so warranty may be relea-

*Harris.*

Assent to a  
Legatee.

A remainder of a  
Chaitell.

see

sed which is meerly in contingency, as it is agreed in *Littleton*, and power of revocation may be extinct by release of him that hath the possession of the Land, and so he concluded and prayed Judgment for the Defendant.

*Nicholls* Serjeant for the Plaintiff, conceived that the Remainder is in *Esse*, and not determined by the Release.

And first he conceived that the Remainder was executed, inso-much that the Release was made at the Request of the Father, which was the first Devisee. for this shewes his assent, and implies that he took notice of his Remainder, and assented to it, and he sayd, it was adjudged in *Doctor Lawrences Case*, that the speaking of these words by the Executors, that is (that they were glad of the Devise) was a good Execution and assent of the Legacy.

Secondly, He conceived that it is only possibility, and for that cannot be released or granted, and he saith that the Law hath great respect of possibilities that Estates may revert, and for that it is adjudged in the 13. of *Richard 2. Dower 55.*

If Tenant for life grants his Estate to him in remainder in tayl for his owne life, the Tenant enters, takes a Wife and dies, she shall not be Indowed, but the Tenant for life shall have it againe; and it shall be as it had been let to a stranger, and to this purpose also he cited, 18. *Ed. 3. 8. Counter-Plea of voucher 8.* And it was adjudged in *Middletons Case 5. Coke 28. a.* that an Executor before probate of the Will may release a Debt, but not an Administrator before Administration granted, see *Com. 277, 278. Fox and Greisbrookes Case*, and in 6. *Ed. 3. Lessee* for anothers life, rendring Rent, the Rent was behind and the Lessor releases to the Lessee all Debts, he for whose life dies, and there the Release determines and discharges the arrearages, for it is a duty, and *Debitum* is Latine as well for Debt as for duty, also release bars the Lord and Writ of deceit for reverser of a Fine levied of land in ancient *Demefne*, as it is 7. *H. 4.* and yet *Littleton* saith, that release of a future thing shall not be a barr, and for that if *Connsee of Statute Merchant*, release all his Right in the land yet he may extend the Statute 15. *assise*. And so if a mad man release, and after come to his wits and dies, *Queere* if the Heire may have a Writ of *non compos mentis*: And he said that it was adjudged in the 25. of *Eliz.* If an Infant levies a Fine, and after he levies another Fine, this shall be a Barr in a Writ of error for the reversing of the first, otherwise of a release: And here to the principall case to a release made by the Son in the life time of his Father without warranty: And so upon all these cases he concluded, and prayed Judgment for the Plaintiff.

*Sherley.*

*Shirley* Serjeant for the Defendant argued, that the acceptance of Release by the first Devisee, shall not be execution of the Devise,

as it was adjudged in *Barramores* and *Tardleys* case by the Education of the Issue, or a *Devise* upon condition to pay money, and the *Executor* pays it, this is a good execution: But here the thing which makes the execution is only release, which enures as Release. And for that the accepting of the release, it cannot be execution of a Legacy. But if the *Executor*, to whom the first *Devise* was made, had had any *Co-executor*, and he would not have suffered him to joyn in occupation with him, that had been full Declaration of his Intent, that he took it as a *Devise*, and not as an *Executor*, as it is agreed in the 10 *El.* 277. *Dyer* 50. And he said also, that it hath been agreed to him, that it is such a possibility that cannot be granted, as it is agreed in *Fulwoods* case, 4 *Coke*, 66.b. And he said it is not like to *Harveys & Bartons* case, where two Joynt-tenants for life were, and one made a Lease for years to begin after his death, and dyed, and his companion survived him, and agreed to be a good Lease against the Survivor, notwithstanding the Contingency. And he conceived that this might be released, and that it is not like to contingent actions, inasmuch that it is a release of right in Lands, see 5 *H.* 7. 31.b. *Colts Affise*, where it is said, if Lord, Mesne, and Tenant are, and the Mesne is forejudged by the Tenant, and after the Lord releases to the Tenant, and after by *Parliament* it is enacted that the fore-judger shall be void, yet the release shall be good against the Lord, and so of actions by *Executor* before Probate: and 14 *Ed.* 3. *Barr*, Release of Dower by *Fyne* doth extinguish it: and *Althams* case 8 *Coke*, if it be made to the Tenant of the Land, that shall be a Barr. And 21 *H.* 7. fol. the last, Release to a Patron in time of Vacation shall be a Barr in annuity brought against the Incumbent: and if the *Lessee* for years be outed, and the *Disseisor* makes a Lease for years to a stranger, and the first *Lessee* release to them both, this is good, as it is 9 *H.* 6. and yet regularly such release is not good without privity: But inasmuch that it is of right to the Land, and to one which hath possession, it is very good. So Release by Copy-holder, extinguishes his Copy-hold right, as it is resolved 4 *Coke*, amongst the Copy-hold cases, and yet hee agreed that some possibilities cannot be released, as in *Albayns* case, power of Revocation, if it be not to the Tenant of the Land, inasmuch that this is a meer possibility. So if an annuity depend upon a condition precedent; but where the returning of the estate is to the party himselfe, as in *Diggs* case, 1 *Coke* 174. a. And also the release in this case is the more strong, inasmuch that the estate in this is recited, as in the case of 44 *Ed.* 3. in release of Ayde. And so he concluded, that admitting there be no election and execution of the Legacy by the acceptance of the Release, then the title of the *Defendant* is good, and if it be a good election & execution: Yet he conceived that all the term remains in the first *Devisee*, and that the remainder is destroyed

destroyed by the release, and so prayed Judgment for the *Defendant*, and so it was adjourned.

*Pasche 1612. 10. Jacobi, In the Common Bench.*

*Manley against Jennings.*

Debt by Obligation.

Request is necessary for his Rent, though that he have a bond for performing Covenants.

**I**N Debt upon an Obligation, with Condition to performe, observe, fulfil, and keep, all *Covenants, Grants, Articles, Payments*, contained in a Lease, &c. The *Lessee* doth not pay the Rent at the day, and the *Plaintiff* without making of any request, begins a Suit upon the Obligation; and upon this matter pleaded in Barr, the *Plaintiff* replied that he was not demanded, and upon this the *Defendant* demurred: And *Harris* Serjeant for the *Defendant* argued, that when any penalty is annexed to a payment of the Rent, be that annexed to the estate, or otherwise, yet it ought to be requested, and without request to pay it, no penalty shall be incurred, as in 22 H. 8. 57. a. b. by *Newton, Ashton, and Port*, where a difference is taken between an Obligation taken for payment of Rent generally, without any relation to a Lease, and where it is only for performance of *Covenants*, and Issue taken upon the request, and after demurrer joyned, and the question if the *Lessee* ought to tender it, 14 Edw. 4. 4. accordingly: And in 21 Edw. 4. 6. a. b. *Pigott* and *Bryan* agreed that there shall be no penalty nor Obligation forfeited, without request, where the Obligation is for performance of *Covenants*, and not precisely for the payment of Rent, and so he concluded, and prayed Judgment for the *Defendant*.

*Nichols.*

*Nichols* Serjeant for the *Plaintiff*, conceived that the *Lessee* ought to make tender upon the Land to save the penalty, and this shall be sufficient: and the *Lessor* need not to make request, and this is the Obligation for performance of *Covenants*, for this doth not alter the nature of the Rent; but if it be for payment of Rent precisely, there the *Lessee* ought to seek the *Lessor*, or otherwise for non payment, he shall forfeit his Obligation, for there tender upon the Land shall not excuse him. And for that if a man makes a Lease for years, rendering Rent at *Michaelmas*, with *nomine pene*, if it be not payed within 10 dayes after *Michaelmas*, and within the 10. dayes, and these differences appear, and are agreed in 22 H. 6. 57. and 6 Edw. 6. *Brooke* tender 20. And he conceived that the Books of 14 Ed. 4. 4. 20. Ed. 4. 6. and 11 Ed. 4. 10. depends upon these differences, that is, that a man shall not distrain for Rent charge without Request, inasmuch that it is as a Debt which is due upon Request, and admit that the case were that a man made a Lease for yeares, the *Lessee* covenants to pay the Rent at the day with a *nomine pene* in default of payment of that, and

and after the Lessee assigns his Interest to one which Covenants to pay the Rent, and performe all the Covenants in the Lease, he demanded in this case who shall make the request, that is, the first Lessor or the Lessee, insomuch that it is penall to the Assignee of them both, and so many Suits may arise upon that, and also he sayd, that it was ruled here upon a motion in arrest of Judgment, that in Debt upon an Obligation to performe Covenants there need not to be alledged demand, upon Solvit or non Solvit put in Issue, for it may be pleaded that it was tendered or payd, and so he sayd it is confessed by the Demurrer, that the Obligation is forfeited, and for that he prayed Judgment for the Plaintiff.

Coke cited Myles and Dragles Case, where a man was bound for performance of a Will, he need not to pay Legacy devised by that for which is no day assigned without request, so if the Obligation be for payment of Legacy expressly and no day assigned, and so it was adjourned.

Trinity 1612. 10. Jacobi, in the Common Bench.

### Gravesend Case.

**I**N Debt, the case was this, that is, the Port-reeve, Jurates and Inhabitants of Gravesend, brought Debt against one Edmonds a Water-man, which plyed the Ferry betwixt Gravesend and London, and counts that Gravesend and Milton are ancient Townes and next adjoyning to the River of Thames, and that the Inhabitants of these Townes have had time out of minde, &c. ancient passage from thence to London, and have used to make By-Lawes, and constitutions for the Government of that passage, and have provided Water-men, Steer-men, and Rowers for the said Passage, the which used time out of minde, to take of every Passenger and his Fardell two pence, and that for their maintenance, and ought to hold the Passage, if their benefit at this rate amounted to foure shillings, or more, and that the Queen Elizabeth by her Letters Patents under the great Seale of England, incorporated the said Inhabitants by the name of Port-reeves, Jurats, and Inhabitants of Milton and Gravesend, and this was in the tenth yeare of her Raigne, and also that they enjoyed the said Ferry without any Interruption, and that they held the tide and Ferry, and that the Port-Reeve, Jurat, and twelve of the Inhabitants had power to make By-Laws and Constitutions for the government of the sayd Ferry, and that every Water-man should observe his turn, and also to impose Fines for the not observing of them, and that in the thirty seventh yeare of the said Queene Elizabeth, a Constitution was made by the then

Debt;

A a

Port-reeve



*Port-reeve, Jurats*, and twelve of the Inhabitants of the said Towns, inſomuch that many *Water-men* ply poore Paſſengers, before that the Barge was furniſhed, and ſo that many other Paſſengers were enforced to looſe their paſſage by the Barge, inſomuch that the paſſage did not amount to four ſhillings, ſo that they did not hold their tyde, ſo that the Barge which had ſuch preheminance, that is, that no *Water-men* ſhall ply any Faire or paſſenger till the Barge had received ſo many of their paſſengers, by which they might receive four ſhillings at the Rate aforeſaid, and be removed from the Bridge at Gravesend unto the Land marke, and that if the *Tiltboate*, or any other *Water-man* received any paſſenger before that the Barge beſo furniſhed, that he ſhould pay the ſayd Port-reeve, Jurats, and Inhabitants for the maintainance of the ſaid Barge for every paſſenger ſo received two pence, and ſo assigned breach of the By-Law in the Defendants, and that he had received ſo many of the paſſengers before the Barge was furniſhed, which amounted to as much as is demanded, by which Action accrued to the Plaintiff to demand it, to which the Defendant pleads that he oweth nothing to the Plaintiffs in manner and forme as they have demanded it, and by the Jury at the Barr it was found for the Plaintiffs, and after that upon motion in the behalfe of the Defendant, the Judgment was arreſted, and now at this day Judgment was prayed for the Plaintiffs.

By *Dodrige Serjeant of the King*, and he conceived that the cuſtome was good, notwithstanding that it was alledged in the Inhabitants, and he ſayd it was no preſcription but Cuſtome, and it is declared to be a good and laudable cuſtome and uſage by the Statute of 6 H. 8. Chapter 7. *Raſſall Paſſage* 8. and he agreed that Inhabitants cannot preſcribe to have matter of benefit, but to have matter of Eaſe, he conceived they might very well, as it is 15 Ed. 4. 29. 22 H. 6. Preſcription 46. 18 Ed. 4. 2. 18 H. 8. 1.

Secondly, As to the Objection, that the living of the other Watermen which are not employed in the Barge is by that abridged, and that when the Water-man is willing to carry, and the Paſſenger to be carried by him, it is no reaſon that a By-Law ſhould abridge this voluntary act of a man, upon which his lively-hood depends, he ſayd that ſo it is not, for nothing is challenged by the By-Law, but only preheminance, and that proviſion be made for the Poore, which is for the publick good, for every one may go with any that he will paying two pence to the Barge or after the Barge is furniſhed paying nothing, and he conceived that the Liberty of the ſubject ought to be ſo abridged, but not altogether aboliſhed, as it is agreed in the Arch-Biſhop of *Yorke* Case in the Register in the Writ of Treſpaſſe fol. 105. b. c. 8 Coke 125. a. *Wagoners Case* 8 Ed. 3. 37. a. 3 Ed. 3. 3. Where the Biſhop of *Yorke* claimes in the Mannor of *Ri-*

pon such liberty, that is, that he and all his Predecessors time out of mind, &c. have had a custome that none in the said Town ought or had accustomed to use the office or mistry of a Dyer, without Licence of the said Arch-Bishop or his Bayliff of the said Town: And also he cited a case in the Register, where the Abbot of Westminster prescribed to have a faire in Westminster upon Saint Edwards day, and for ten daies after: And that no Citizen nor other in London, during that time should sell any thing in London, but in this faire, and after the Abbot remitted this priviledg, and had of the Citizens of London for that; one thousand five hundred pound: And so it was adjudged in Sir George Farmers Case, for a bake-house in Toffiter, and that none shall bake any Bread to sell, but in his bake-house and good: And so he conceived that Custome may be restrained all passengers till the Bardge be furnished, as in 2. Ed. 3. 7. Grant that all Ships, laded and unladed in such a Haven, shall be laded and unladed in such a place, and a good grant, notwithstanding that it restraines all people to a certaine, and if this be good by grant, then Fortiore shall be good by custome, and to the other objection, that this custome shall only bind the Inhabitation and not strangers, he conceived that custome might tye strangers that came into the said Town very well, as it is agreed in 22. H. 7. 40. So the By-Law shall bind strangers, when it is only for Acts to be made within the Town and for the publike good, as it is agreed in the 44. Ed. 3. 13. and 8. Ed. 2. assis. 413. ordinance against him which estops passage by water and good, and so he agreed in the Chamberlaine of Londons Case, that By-Law made in London shall bind all, as well strangers as Citizens, which sell any Drapery in the Hall there, though that they Inhabit in any place out of the City: And also he said that the Bardge-men which have the losse, shall have the benefit, for they shall have the two pence for every one that passes otherwise, before that they are furnished, and this is recompence for them which are tyed to perpetuall attendance, and he conceiveth that the demand is very well made, notwithstanding that the duty accrues from many times, for he hath carried so many men at one time and so many at another, the which in all amonnts to the sum demanded: And so he concluded, and praied Judgement for the Plaintiffs.

Wynch Justice, that the Count is not good, for the Plaintiffs have not alledged that they have used time out of mind, &c. To maintaine Ferrey, but only that they have used to make Constitutions, Secondly, it is not alledged that they onely have used to maintaine Ferrey, and if they cannot prescribe in the sole using of that, and to exclude others, then others may use that as well as they, being for the publike good, for how shall they be punished, if

Wynch.

that they do not use and maintaine; at the Common Law the Inhabitants of a Towne shall be punished for not repairing of a Bridge, or high Way, the which may be maintained by the Inhabitants together, and if they do not do it, then others may do it, as well as others may repaire high Waies or Bridges, as those which have used to repaire them, as a common Host shall be punished in Eyre if he refuse to lodge any man, and yet he which he refused to lodge, may have an Action upon the Case for the refusal: Also the Patent gives the forfeiture to the *Port-reeve*, but the By-Law doth not make any mention who shall have it, and he conceives that it shall not be as upon the *Statute of 2. Ed. 6.* Which gives penalty for not setting forth of *Tythes*, but doth not appoint who shall have them: and this was adjudged to be to him which ought to have the *Tythes*, but this cannot be so here, insomuch that it is against the Grant, and agreed that a stranger shall be bound by By-Law, where it is for the publick good, but not otherwise, and also the custome that these *Bardge-men* shall have the preheminance, may be good, as well as custome that the poore of such a Parish shall have common in such a place till such a day, and then the others, and so in this case; and so he concluded that Judgement shall be Arrested.

Warburton.

Warburton Justice conceived that the Count is good, and that the Inhabitants may prescribe very well, as 47. *Assise*. foure Townes were charged for the repaire of a High way, and so may the two Townes for the Ferrey, that he intended to be high way upon the water, and also he conceived that this is inquirable in Eyre, and also by the Justices of the Kings Bench, and now by the Justices of Assises by Indictment by the name of Inhabitants: The which may be as good an Action upon the *Statute of Winton* against the Inhabitants of the Hundred, and so he conceived, that in this case the Inhabitants of *Milton and Gravesend* may be punished by Indictment if they do not repaire the Ferrey, and that the King there this day may erect a Ferrey in place where it is necessary, for the King may erect office which is for the benefit of the Common Wealth, but not to charge the Common Wealth: And that if any will passe in his owne Ferrey, without carrying of another, this is no breaking of the By-Law; and so he concluded, that Judgement should be given for the Plaintiffs.

Coke cheife Justice seemed the contrary, for he conceived it is not shewed in the Count to whom the Ferrey belongs, for the owners of that are not mentioned, the which it ought: And yet he agreed that a Ferrey may be without owner, as it is agreed 12. *Ed. 4. 8.* Insomuch as this is locall and need not any Agent, but out of *Leete and Ferrey* otherwaies it is, for there ought to be Agent, or otherwise the Ferrey should be of no use, and for that there ought to be an owner.

Secondly

Secondly it is alledged that *Infra Easterne Townes*, there is such a custome that the Inhabitants may make constitutions, and that the Inhabitants shall maintaine a *Ferrey*, but not that there was a *Ferrey*, but that he conceived it might be good, insomuch that it is not traverfable.

Thirdly what Action the Inhabitants may have, if they be disturbed of it, for this is no easement, and they have no Estate of Inheritance, and for that the Prescription by the name of Inhabitants is not good, for they cannot have Estate, and to the *Statute of 6. H. 6.* chapter 7. Which saith, it is a laudable custome and usage that a Bardge shall be maintained, but not that Inhabitants shall maintaine that, nor those incorporate, so that the *Statute* doth not make them capable of such a thing, for which a Writ of right, and assise by the *Statute of Westminster 2.* lies.

Fourthly, That the custome and the Patent are repugnant, for by the custome the Bardge hath not any *preheminnence nor precedence*, but equall liberty was to all water-men to carry what *passengers* that they could, and with that also agreed the *Statute of 6. H. 6.* And then if the custome were not so, this cannot be made by the grant of the *Queene*, nor by the By-Law, for this is the liberty of the Subject, the which cannot be abridged nor restrained by them, for if the King may grant such *preheminnence here*, so may he do in all other *Ferreis* and places, and also in the practise of the Law, to have *preaudience* in this Court, and in all other Courts of Justice: And so should it be also of Butchers and Bakers, and all others which used buying and selling: And he said that the King hath preemption of time in some places, but this is not by his prerogative, but by the custome of the place; And he agreed that custome in subject may have *preemption*, but not by the Kings grant, for the King cannot grant that to another that he himselfe hath not by his prerogative, and perchance he which hath such grant, will not come to Market, till all the Market be ended, and he conceived that the River of Thames is so publick, that the King cannot restraine that by his grant, no more then he can grant *preheminnence* to a Coachman to carry people into the Streets of *London*: The which is adjudged upon the matter in the 50. of *Ed. 3. Toll. 2.* Where the King grants Toll for every one which passeth by a Common way: And agreed that it was not good if it be in a Common Way, or in a Common River, for as it is resolved in the 22. *assise. 93.* Every common River is as high *Street*, and Common Waies and the passengers Way as the water increases, and the Thames is a branch of the Sea and a common *Street*, as it appears by *Bracton fol. 8. 5.* The Plaintiffs have brought their Action by the name of Corporation of *Portreeve*, Jurats, and Inhabitants of *Milton and Gravesend*, and they are

are incorporate by the name of *Port-reeve*, Jurates, and Inhabitants of *Gravesend*, possessors of Ships, the which words are left out in the name, by which the Action is brought, so that the By-Law is not made by the same name, by which they are incorporate, nor the Action brought by the same name: And yet *he agreed* that they might make a By-Law according to the grant, without calling all the Inhabitants to it.

Sixtly, He conceived that the constitution is not pursued, for the constitution is; that if any Water-man carries any passenger willing to go by the Barge, that such Water-man shall pay for every such passenger two pence. And it is not averred that the passengers which the Defendant hath carried, were willing to be carried by the Barge, and so not pursued.

Seventhly, The Constitution is further that no Wherry-man shall carry any passenger, before the Barge be fully dismiss and transmist, and this is not good, for it may be the Barge will not passe to *London* at all this Tyde, and for that it ought to be averred that the Barge departs in convenient time after *that it is furnished*, for otherwise custome that none shall put his Beasts into such a place, till the Lord hath put in his Beasts is not good, for it is resolved in 2. H. 4. 24. And the reason is, insomuch that it may be, *that the Lord will not put in his Beasts at all*: And to the objection *that the By-Law shall not bind a stranger*, he conceives that if all other circumstances had *been concurrent*; *that had been very well*, insomuch that it was within the place *where* they had power to make By-Lawes, and also for the publick good, and this as well as the custome of *Forraine* bought, and *Forraine* sold, the which is only for strangers: And to the objection, that they are severall owners of severall Barges, and for that ought not to joyne in this Action, he saith this doth not appeare by the Count, but it is said that they *were* possessed, and for that they shall be intended Joynt Owners; and so he concluded, that Judgement shall be arrested.

Trinity 10. Jacobi, 1612. in the Common Bench.

Downes against Shrimpslaw, Trin. 9. Jacobi, Rot. 334.

**I**N action of Trespasse for *Assault* and *Battery*, the case was this: The Plaintiff in his Count supposeth the Trespasse to be made the first day of *May*, 8 Jacobi, at such a place. The Defendant pleads that the Plaintiff the same day would have assaulted and beaten him, and that the Defendant laid his hands upon him to defend himselfe, and if any hurt came unto him, it was by his own wrong, the which is the same Trespasse for which the Plaintiff hath complained him.

The



The *Plaintiff* replies, of his own wrong without such cause; upon which Issue was joyned; and at the *Nisi prim* for Justification, the *Defendant* produced Witnesses, which proved an assault to be made by the *Plaintiff* upon the *Defendant* long time, that is, by the space of a yeare before the day contained in the Count, and that at this time the *Defendant* to defend himselfe, hath assaulced the *Plaintiff*: And upon this Evidence the *Plaintiff* demurred, inso much that this proves an assault made at another day then is contained in the Count, and the *Defendant* by pleading hath confessed an *Assault* and *Battery* made upon the *Plaintiff*, the day contained in the Count, and now upon Evidence proves his Justification at another day: and if this Evidence were sufficient to prove his Justification, was the question. And if by this pleading the day be made materiall, in which it was agreed by the Court, and Councell also, That if the *Defendant* had pleaded not guilty, the day had not been materiall. But the *Plaintiffe* might have given in Evidence any *Battery* before the day contained in the Count, or after before the action brought, and this is sufficient to prove his *Declaration*: but the Parties, that is, the *Plaintiff* by his Count and *Replication*, and the *Defendant* by his *Justification*, have agreed of the day: And for that if they may now vary from that it was moved, and so it was adjourned.

Trin. 10. Jac. 1612. in the Common Bench.

Laury against Aldred and Edmonds.

**I**N Debt against the *Defendants*, as *Executors* of *William Aldred*, dead, upon an Obligation made by him in his life time, of 50: l. The case was this, one of the *Defendants* confessed the action, the other pleaded that the *Testator* dyed such a day, and that he intending to have letters of Administration, caused the Corps of the *Testator* to be buryed, and his goods safely to be preserved and kept, and that after administration was granted to him by the *Arch-Deacon*, and that after that one *Harnego* brought action against him as *Administatrix* by letters of Administration committed to her by the Commissary of the Bishop, being Ordinary there, and recovered, and averred that this was a true Debt, and that he had no goods which were the *Testators*, besides the Goods and Chattels which did not amount to the said Debt, and so demanded Judgment if action, and upon this the *Plaintiff* demurred in Law.

Debt against  
Executors.

*Davis* Serjeant argued for the *Plaintiff*, that the *Defendant* ought to have confessed and avoyded, or traverse the point of the action, and not conclude Judgment if action: See 1 *Eliz. Dyer* 166. 10. When intermeddling made men *Executors* of their owne wrong, that

*Davis*.

is,

What acts doe  
make an Exe-  
cutor, De son  
tort, what not.

is, when he meddles without any colour of title or authority, as receiving Debts, and disposing the goods to his owne use. But if a man administred about the Funeralls, or be made a Coadjutor, or Overseer, this shall not make him Executor of his own wrong, or by reason of a Will which is after disproved by probate of one Letter: and in these cases, if he be charged as *Executor*, he ought to plead speciall matter, without that, that he administred in other manner: and in 20. H. 7. 27. a. 28. b. adjudged in Debt against one as Executor, which had Letters, *ad Colligendum bona defuncti* only, which pleaded the speciall matter, without that, that he administred any other way, and other manner was out of the pleading; for he did not administer in any manner with Intermeddling by the letters *ad colligendum*: and 9 Ed. 4. 33. b. If an action be brought against an Executor of his owne wrong, and after *administration* is committed to him by the Ordinary, this shall not abate the action: upon which Books he inferred, that the *Defendant* ought to have traversed, that he administred as Executor, and insomuch that hee hath pleaded that he hath not so pleaded, the plea was not good; and also insomuch that he hath pleaded, that he hath no goods of the *Intestate* besides goods which doe not amount, &c. And this is uncertain, and not good, for he ought to have shewed what goods he had in certain, and the value of them, insomuch that they remain as *Assets* in his hands, and so he concluded, and prayed Judgment for the *Plaintiff*.

Barker.

*Barker* Serjeant for the *Defendant*, argued, that though that the action in which *Harnego* recovered, was begun after the action now hanging, yet insomuch that judgment was first had in that: now that shall be preferred otherwise before Judgment, for till Judgement the elder action shall be preferred. And he conceived, that if the Writ was abateable, and the *Defendants* would not abate it by plea, that shall not prejudice the *Plaintiff* which is a stranger, and doth not know if these *Defendants* are *Executors*, or *Administrators*, as it is said by *Danby*, 9 Edw. 4. 13. And he conceived that the plea is good, that the *Defendants* have not goods, besides the goods, which do not amount, &c. And divers presidents were cyted by him to this purpose, as *Trin.* 18. Eliz. Rot. 1405. between *Blanckson* and *Frye*. *Hillary*, 40 Eliz. Rot. 902. *Smalpeeces* case: and *Trin.* 44 Eliz. Rot. 1900. between *Goodwin* and *Scarlet*, in all which the pleadings were all one with the plea in question, and no exceptions taken to that: and infinite other presidents may be shewed in the point, for which cause he demanded Judgment for the *Defendants*.

*Coke* cheife Justice seemed, that in an action brought against one as Executor, he may plead that *Administration* was committed to him for such intent that the dead dyed *Intestate*, and demands Judgment if action without traverse, that he was Executor, and with this agreed

agreed, 1 Ed. 4. 2. a. 20 H. 6. 23. And so if the Ordinary be charged as Executor, he may plead that he administred as Ordinary without traverse, that he was Executor, but only shewed that the party dyed *Intestate*, and the Plaintiff ought to reply, that he made a Will, and the Defendant proved that, and traverse that he dyed *Intestate*, and with this agreed 9 Edw. 4. 33. and 1 Edw. 4. 11. And if an action be brought against Executor of his own wrong, hee may plead that *administration* is granted to such an one, and the Party dyed *Intestate*, and demand Judgment if action, for he shall not be charged for more goods then came to his hands: But if a man administer of his own wrong, and after rightfull *administration* is committed to him, yet he may be charged as Executor of his own wrong, insomuch that Right of action is attached in him. But this seems for the goods that he hath administred before rightfull *administration* committed unto him. And he cyted 14 Eliz. Dyer 305. b. where in debt brought against one as Executor, which pleads never Executor, nor ever administred as Executor; and the Plaintiff replies, that he administred as Executor of the Will, &c. and so to Issue. And in Evidence the Defendant shews Letter of *administration* to him committed of goods of the dead, by which he administred them, and before that he did not administer, and this seems there to be good Evidence, but the Book was *Quere* of that, and for that he would rather plead that in abatement of the Writ, and so the Book inclined also. And he conceived here, that the meddling with the goods here by the Defendant, as Administrator, made him Executor of his own wrong, insomuch that it was for Funeralls, and when it is a work of Charity, and the other is to preserve them. And the Defendant hath not conveyed himselfe to be Executor, insomuch that he said, that *administration* was committed to him by an Arch-Deacon, and he doth not say that *Administration* of right belonged to him to commit, insomuch that hee hath but a sub-ordinate Jurisdiction: And the Common Law doth not take notice, that he, nor no other but the Ordinary hath such power, and for that the power of all, which have such subordinate and peculiar Jurisdiction is pleaded, that ought to be shewed, as it seems by 1 Ed. 4. 2. a. b. 22 H. 6. 23. And the rather when this is pleaded by the Administrator himselfe, which ought to have notice of that, and make title to himselfe; and if so it be, then he conceived that the Recovery by *Hornego* was void, and so all the goods confest, remain as *Assess*. Also he conceived, that if the Executor allow a Writ to suffer Judgment to be had against him, upon a Writ which is abateable, he shall not have allowance of that, but this shall be returned as *Devastavit*, as in 10 Edw. 3. 503. a. If the Tenant vouch when he might have abated the Writ, he shall lose the benefit of his Warrantie: So here and Com. *Manwells* case, 12. a. 22

*H. 6. 12. b.* Also he conceived, if a man be charged as *Administrator* where he is no *Administrator*, he cannot plead that he never administered as *Administrator*, but he ought to traverse the Commission of Administration, as it appears by *21 H. 6. 23.* And it seems also to him, and by *9 Edm. 4. 33.* that if a man be an *Executor* of his owne wrong, and after administration is committed to him, and he is charged as *Executor*, after administration committed, that the *Writ* shall abate, otherwise if administration be committed, hanging the *Writ*. So if a man be made *Executor*, and hee not knowing of that, sues letters of Administration, he shall be named *Administrator*, and if after when he hath notice of the Will, he proves it, then he shall be impleaded by the name of *Executor*, for in such manner as the power is given to him by the Bishop, he shall be charged: and it seems though that he plead where he is *Administrator*, and is sued as *Executor*, or otherwise in such manner, that hee might have abated the *Writ*, or suffer Judgment, yet the *Writ* shall abate: and he intended also, that *Executor* of his owne wrong, might pay debts due to another, and shall be discharged, and shall not be charged with more then he hath in his hands. And if two *Executors* are joynly sued, and one confesse the action, this shall bind him and his companion also for so much as he hath in his hands. But if an *Executor* of his own wrong confesse the action, this shall not prejudice him which is rightfull *Executor*, and so he conceived that judgment ought to be given for the Plaintiff.

Warburton.

Warburton Justice conceived that the Barr is good, notwithstanding that he did not shew, that the Arch-Deacon had power to grant Administration, insomuch it is no Inducement and the Defendant doth not relie upon it, as *Littleton* saith, in Trespasse where the Defendant pleades that it was made by two, and the Plaintiff releases to one, and if the Defendant pay due Debts it is not materiall, whether he have Authority or not, though that it be in another respect: As if a man be Indicted of man-slaughter and acquitted, and after is Indicted of Murder by the same man, he may pleade another time acquitted, insomuch that these are matters of substance: But here it is but of forme, and then if it be not shewed it is not materiall: But the matter upon which he relied was, insomuch that the Action was brought against two *Executors*, and one hath confessed the Action: And he intended without question, that if this shall bind his companion, and for that he will not dispute the other questions, but declares his opinion cleerely, that the Plaintiff ought to have Judgement against both these Defendants upon the confession of one, and this shall bind his companion: Wynch Justice conceived that the Plea is good by *Administrator* without traverse, insomuch that it is to the *Writ*, as it appears by *9 Edm. 4. 33. 37 H. 6. 32 H. 6.*

Wynch.

1. *Ed. 4. 2. 50. Ed. 3.* And he conceived that the burying is not any Administration, nor the taking of the goods into his custody to preserve them; no more then in Trover and Conversion; when a man takes the goods for to preserve them: And he agreed that where a man intitles himselfe to goods by Administration committed by any but by the Bishop, he ought to pleade specially, that he which committed it had power to doe it: But here it is not so, but only conveyance, and for that need not here such precise pleading of that, insomuch it is only execution of Administration, and for that it is good without intitling the Arch-Deacon: And he agreed that an Executor of his owne wrong may pay Debts due to another, and shall be discharged: And he agreed also that the Confession of one Executor shall bind his Companion, and that Judgement shall be given upon that for the Plaintiff: And they all agreed that the pleading, that the Defendant hath no goods, besides the goods which do not amount, &c. it was not good, and for these causes they all agreed that Judgement ought to be given to the Plaintiff.

*Trinity 10. Jacobi, in the Common Bench.*

*Tyrer against Littleton 9. Jacobi, Rot. 299.*

**I**N Trespasse for taking of a Cow, &c. Upon not guilty pleaded by the Defendant, the Jury gives speciall Verdict as it folowes, that is, that the Husband of the Plaintiff was seised of eighty Acres of Land, held of the Defendant by Harriot service, that is, the best Beasts of every Tenant which died seised, that he had at the time of his death, and that the Husband of the said Defendant, long time before his death, made a Feoffment of that Land in consideration of marriage and advancement of his Son, to the use of his Son and his Heires, with such agreement, that the Son should redemise to his Father for forty yeares, if he so long lived, and that after the marriage was had, and the Son redemised the Land to his Father, and the Father enjoyed that accordingly, and paid the Rent to the Lord, and after died, and that the Plaintiff had no notice of his Feoffment, and that the Husband at the time of his death was possessed of the said Cow, and that the Defendant took it as the best Beast in name of Harriot, and also found the Statute of 13. *Eliz.* of fraudulent conveyances to deceive Creditors, and so prayed the direction of the Court, and this was agreed by the Plaintiff aforesaid.

*Trespasse.*

*Harriot.*

*Nicholls* Serjeant, first that all conveyances made upon good consideration and *Bona Fide* are by speciall *Proviso* exempted out of the

*Nicholls.*



*Statute of 13. Eliz. chap. 1.* And he conceived that this is made upon good consideration, and *Bona Fide*, and for that it is within the said *Proviso*, and also he said, that as upon the *Statute of Marlebridge* there is fraud apparent and fraud averrable, as it appears *12. H. 4. 16. b.* Wherein ward the Tenant pleads that his Father levied a Fine to a stranger, the Lord replies that this was by Collusion to re-enseoff the Heire of the Tenant at his full age, and so averred that to be by Collusion to oust the Lord of his Ward, and this is fraud averrable: But if the Tenant had enfeofed his Tenant immediately in Fee-simple, this is apparent without any averment, and the Court may adjudge upon it: And so upon the *Statute of 27. Eliz. chap. 4.* it appears by *Burrells Case*, that the Fraud ought to be proved in Evidence, or confessed in pleading, or otherwise this shall not avoid conveyance, for it shall not be intended, *6 Coke 78. a.* and see *33. H. 6. 14. b.* *Andrew Woodcocks case*, upon which he inferred, that this is but a fraud averrable, if it be a fraud at all, and of this the Court could not take notice, if it be not found by the Jury, and he said upon the *Statute of 32. H. 8. Of Devises*, as it appears by *Knights Case*, *8 Coke*, and *12. Eliz. Dyer 295. 8, 9, 10, 10, 11, 12, 13, 14, 15, 16, 17.* And so he concluded, and praised Judgement for the Plaintiff.

*Harris.*

*Harris Serjeant* for the Defendant; argued that the Circumstances which are found in the speciall Verdict are sufficient to satisfy the Court that it is fraud, for as well as the Court may give direction to the Jury upon Evidence that it is fraud and what not, as well may the Court Judge upon the special matter, being found by special Verdict at large, as in *9 El. Dyer 267. and 268.* that is, the special matter being found by special verdict at large, as in *9 El. Dyer 267. 268.* that is, the special matter is found by Inquisition upon *Mandamus*, and leave to the Court to adjudge if it be fraud or not, and in *12 El. 294. and 295. 8.* the special matter was found by Jury upon *Eligit* directed to the Sheriffe, and by him returned to the Court: And in *Trinity 27. Eliz.* between *Saper and Jakes* in Trover the Defendant pleades not guilty and gives in Evidence as assignement of a Terme to him with power of revocation: And the Court directed the Jury, that this was fraudulent within the *Statute of 27. Eliz.* to defraud a purchaser, and in *Burrells Case 6. Coke 73. a.* before the fraud to the Court upon Evidence to the Jury, and the Court gave direction to the Jury that it was fraud, and that upon the Circumstances, which appears upon the special Evidence: And so in this case he conceived, that insomuch the circumstances appear by the Verdict, that the Jury may very well adjudge upon it; and so he concluded, and praised Judgement for the Defendant.

*Coke.*

*Coke cheife Justice* that the *Statute of 13. Eliz.* Doth not aid the

the Defendant, inſomuch that the Feoffment was made for good conſideration, and for that ſhall be within the ſaid *Proviſo*, for if that ſhall be avoided at all, that ſhall be avoided by the *Statute of Marlebridge*, which is only affirmance of the Common Law, and this is the reaſon, that notwithſtanding the *Statute* ſpeakes only of Feoffment by the Father to his Son and Heire apparent, yet a Feoffment to a Coſin which is Heire apparent, is taken to be within the *Statute*, and in the 24. of *Eliz.* in *Sir Hamond Stranges Caſe*: It was adjudged that if the Son and Heire apparent in the life time of his Father, purchaſe a Mannor of his Father for good conſideration, this is out of the *Statute*, and ſo it was adjudged in *Porredges Caſe*; alſo he ſaid that the Law is an Enemie to fraud, and will not intend it being a conveyance made for conſideration of a marriage to be fraudulent, no more then if the Father had made a Feoffment to the uſe of a ſtranger for life, the remainder in fee to his Son and Heire, the which is not within the *Statute of Marlebridge*, as it is agreed in *Andrew Woodcocks Caſe*, 33. H. 6. 14. b. Alſo he conceived, that the Feoffment in conſideration of marriage, naturaliſt love to his Son, and that the Wife of the Sonne ſhall be Indowed, and that the Son ſhould redemiſe that to his Father for forty yeares, if he ſo long lived, and that the Father ſhould pay the Rent to the Lord, theſe he intended to be good conſiderations, and for that ſhould be within the ſaid *Proviſo* of the *Statute of 13. Eliz.* otherwiſe if it had been to defraud Creditors: But if it had been to ſuch intent, that is to defraud Creditors, this ſhall not be extended to other intent, that is to defraud the Lord of his Harriot: And in the 28. of *Eliz.* it was adjudged in the Kings Bench, if a man make a Feoffment in Fee to the uſe of himſelfe for life, remainder to his Son in tayl, with divers Remainders over, with power of Revocation, and after bargaines and ſells to a ſtranger upon condition, and after performs the Condition, that yet the firſt conveyance remains fraudulent, as it was at the time of the making of it: But this is only as to the purchaſor and not as to any other. And in *Goodbers Caſe*, 3. Coke 60. a. In debt againſt Heire which pleads nothing by diſcent ſay of the Writ purchaſed; the other joynes Iſſue, and gives in Evidence fraudulent conveyance, and upon ſpeciall Verdict adjudged that it was very good: See alſo 4. Coke 4. b. c. *Vernans Caſe*, the Colluſion to have Dower and Joynature alſo: And ſo he concluded that Judgement ſhould be given for the Plaintiff.

253 Elix.  
Dyer 193. a.  
Wrenſfords  
caſe according-  
ly.

*Warburton* Juſtice agreed that the fraud ſhall not be intended if it be not found, no more then if a man grant an Annuity to another, *Quam diu ſe bene geſſerit*, in Annuity, for that he need not to averr that he hath behaved himſelfe well, for this ſhall be intended.

ded, if the contrary be not shewed of the other party : So here in-  
somuch that it is not found to be fraudulent, it shall be intended to  
be *Bona fide* : And he agreed that if it had been fraudulent at the  
first : If the Son had made a Feoffment over in the life of the Father,  
as it is agreed in *Andrew Woodcocks Case*, 33 H. 6. 14. that then the  
fraud is determined : So here when the Son hath made a Lease to his  
Father, this determines the fraud if any be, and so he concluded that  
Judgment should be given for the *Plaintiff*.

*Wynch.*

*Wynch* Justice agreed, inso much that it is expresse consideration  
found by the Verdict, and for that other consideration shall not be  
intended, and also that it shall not be intended that the Conveyance  
was made to defraud or to deceive the Lord of such a *Peccadell*  
as *Harriot* is, which is of small consequence ; but if it be a fraud  
within the *Statute of 27 Eliz. apparent* ; that is, if it containe pow-  
er of revocation, which is declared to be apparent fraud by the  
*Statute*, the Court may take notice of that without any averment ;  
And he saith, That in the 2. and 3. *Eliz. Dyer, Wainsfords Case*,  
193. a. and 9 *Eliz. Dyer* 267, 268. there is no averment of fraud,  
but expresse Issue joyned upon the Fraud, and for that he need not  
any other averment : And so he concluded also that judgement  
should be given for the *Plaintiffe*, and so it was Ruled accordingly,  
if the *Defendant* did not shew other matter to the contrary at such  
a day, which was not done.

Trinity 10. Jacobi 1612. In the Common Bench.

Strobridge against Fortescue and Barret.

*Release.*

**I**N a *Replevin* the case was this, A man seised of Lands in *Fee*  
devises Rent out of it with clause of Distress and dies, his Son  
and Heire enters and dyes, the Rent is behind, the Son of the  
Son dyes, and his Son enters and makes a Feoffment to the Plain-  
tiff, and the *Devisee of the Rent*, releases all Actions, Debts,  
and Demands, to the Feoffor, and after distraynes the Beasts of  
the Feoffee, for the Rent behinde, before the Feoffment, and it  
seemes the Release is not good, inso much that the *Devisee* had no  
cause of Action at the time of the Release made, against him to whom  
the Release is made, nor Demand against him, otherwise if the Re-  
lease had been made to the Feoffee, for he was subject to the distress,  
and this is a demand.

Trinity

Trinity 10. Jacobi. 1612, In the Common Bench.

## Case of Cinque Ports.

**N**OTE that Coke said, that it hath been adjudged by three Cinque Ports Judges against one in a Case of Cinque Ports, that the Cinque Ports cannot prescribe to take the Body of a Freeman in Withernam, as they use for another; for this is against the Statute of Magna Charta, *Quod nullus liber homo Imprisonetur nisi per Legate Judicium*, and also against the liberty of a Subject, but they more inclined that they might take the Goods of one in Withernam when another is arrested, and them retain, and this seemes the more reasonable Custome and Prescription.

The Case was, Tenant for life, the Remainder for life with warranty, the first Tenant for life was impleaded, and he vouches him in Reversion; but he first prays in aid of him in Remainder, and if this aid prayer shall be granted this was the question. Tenant for life with warranty.

And it seemes by Nicholls Serjeant, that it shall not be granted, Nicholls.  
see 11 H. 4. 63. Where it is agreed that if a man makes a Lease for life, Remainder for life, Remainder in fee, and the first Tenant for life hath ayd of him in remainder for life, and he in Fee joyntly, and 44 Edw. 3. 20. in Trespasse against a Miller which takes Toll where he ought to grind Toll-free; the Defendant saith that 7. had the Mill for life, and that he is his Deputy, the reversion to W. in Fee, and prays ayde of the Tenant for life, and of the Tenant in reversion, and had it of the Tenant for life, and not of him in reversion, and this for default of Privy, as it seems to Brooke, Ayde 30.

Haughton conceived that it should be granted for Tenant for life, notwithstanding that he may plead any Plea, yet he doth not know what Plea to plead without him in reversion, but by the ayde, praying al the Estate shall be reduced into one, and the warranty shall come; and for that he conceived, that the first Tenant for life shall have ayde of him in remainder for life. Haughton.

Wynch Justice conceived that ayde shall not be granted against the first Tenant for life, against him in remainder for life, for he conceived that ayde is alwaies to be granted, when the defects of him and his Estate which prays it, are to be supplied by him which is prayed; that this is the reason that he may have ayde of his Wife, and where there are many remainders, the first Tenant may have ayde of them all; otherwise where he is Tenant for life, the remainder for life, and the reversion expectant, for the Tenant for life cannot supply his defects; and with this agreed the expresse Booke of 11 Edw. 3. Fitz. Ayde 32. and so he concluded that it should not be granted. Wynch.

Warburton

Warburton.

Warburton Justice doubted, and inſomuch that the granting of ayde where it is not grantable, is no error, but otherwiſe of the denying of that where it ought to be granted, he would be adviſed: But he conceived that the cauſe for which ayde is granted, is not the feebleneſſe of the Eſtate of him which prays it onely, but to the intent that they may joyne together, and one defend the other, for Tenant for life may plead ſome Plea, which he in reverſion may plead, ſaving the joyning of Iſſue in a Writ of Right, and he had a Manuſcript of the 11 Rich. 2. where Tenant for life, the remainder for life, the remainder for life was, and the firſt Tenant for life had ayde of them both in remainder, and ſo concluded.

Ayd granted.

Coke.

Coke cheif Juſtice that aid ought not to be granted in this Caſe, inſomuch that he which is the firſt Tenant hath greater Eſtate then he in Remainder, for his Eſtate in Remainder is more Remote and uncertaine, and to the Book of 11 R. 2. He agreed, that the ayd was granted of all in Remainder, but there they in Remainder had Eſtate tayle, and he ſayd that ayd is to be granted in two Caſes, in perſonall Actions to maintain Iſſue, and when Tenant for life prays in ayd of him in Remainder or Reverſion, without which they cannot answer nor plead, nor Iſſue cannot be deduced, but ſo it is not here, for the firſt Tenant for life may answer and plead to the Iſſue, as well without him in Remainder for life, as with him, for if Tenant for life, Remainder in tayl, Remainder in fee, if the firſt Tenant for life be impleaded he ſhall have ayd of him in Remainder in tayl, otherwiſe if the Reverſion had been to the firſt Tenant for life, with a meſne Remainder in Tayle, 41 Ed. 3. 42 Ed. 3. 10 Ed. 3. And 11 Ed. 3. Receit 118. Tenant for life, Reverſion for life, Remainder in fee was, he in Reverſion for life ſhall be received upon default of the firſt Tenant for life, and if he will not, then he in Remainder in fee ſhall be received, and yet he ſhall not have Waſt, as it appears by 24 Ed. 3. for this deſtroies the firſt Eſtate; but the receit maintains and preſerves it, and he ſayd, that the 11 Ed. 3. Ayd. 32. before cited, rules this caſe, and ſo of 4 H. 6. And ſo he concluded, and inſomuch that Warburton doubted of it, it was adjourned.

Trinity 10. Jacobi 1612. In the Common Bench.

Yet Rowles againſt Maſon, See before 57.

Wynch.

WINCH Juſtice argued that the Defendant is not guilty, and that the Plaintiff ſhall take nothing by his Writ, for he conceived that the verdict is uncertaine, inſomuch that it is not found that Livery and Seiſin was made upon the Leaſe for three lives of the Mannor



Mannor, but onely one *Memorandum*, that it was made in the house of the Lord, but it is not found that this House was parcell of the Mannor, but after it is found that the Lessee by force of this was seised, by which it is implied that it was very well executed, and this being in speciall verdict, would be very good, he conceived, there were two principall matters in the Case.

*Verdict uncer-  
taine.*

First, Upon the Bargaine and Sale of Trees, if they be re-united to the Mannor, or remaine undivided.

Secondly, Upon the two customes, the which he conceived depend upon a question, for the first warrants the second.

And to the first, When a man devises a Mannor for three lives, and by the same Deed in another clause, bargaines and sells the Trees, and then insues the *Habendum*, and this is of the Mannor only, and limits Estate of that for three lives without mention of the Trees, hee conceived that the Trees passe before the *Habendum* absolutely, and it is not like to a Bargaine and Sale of a Mannor with Trees, or Advowson appendant, and here the purpose and intent appears, that they shall pass together and as appendant: But in the first case they shall passe as a Chattell immediately upon the delivery of the Deed before any livery made upon this to pass the Mannor, and if Livery had never been made, yet he shall have the Trees, see 23 *Eliz.* 379. 18 *Dyer*, Where a man devises and grants a mannor and trees, *Habendum* the Mannor for one and twenty yeares without mention of the Trees, and yet by *Windham, Periam, and Meade*, against *Dyer*, the Lessee cannot cut and sell the Trees, for there was all in one sentence, that is, the grant of the Trees and the Demise of the Mannor, see the 8 *Coke Pexells Case*, how a Grant shall be construed, and where that shall be intended to pass Inheritance, and where to pass but a Chattell, where a man grants a Chattell and ten pound yearly to be payd, and in 7 *Ed.* 4. If a man hath Inheritance and a Lease in one Town, and he by one and the same Deed, gives, Grants, Bargaines and sells all to one, *Habendum*, the Inheritance to him and his Heires, this is no forfeiture of the Lease, insomuch that the Fee doth not passe of that, so in the Principall Case, Fee-simple passeth in the Trees, and Free-hold in the Mannor, and he conceived that by the Demise over, the Land and Trees are not re-united, and this he collected out of *Herlackendens Case* 4. *Coke* and 12. *Eliz.* *Bendlowes*, a man made a Lease for anothers life, and bargaine and sold the Trees to him for whose life Lessee dyes, he for whose life becometh occupant of the Land, he shall have severall Estates, one Estate in the Land, and another Estate in the Trees, and so in *Ives Case*, 5 *Coke* 11. a. Lessee takes a Lease first of Land except the woods, and after takes a Lease of the Woods and Trees, and they remaine distinct and though that after there are generall

words in the Lease, that is, of all Meadowes, Pastures, Profits, Commodities, &c. That is not materiall, for these shall be referred to all such things which belong to the Land, and so he concluded this point, that the *Trees* remain severall from the Land, and do not passe to *Hoskins* by the Demise of the Copy-hold only, and so he cannot take advantage of the forfeiture, otherwise he did not doubt but that the particular Sum might take advantage of the forfeiture.

Secondly, for the customes, he conceived that the first, that is, that the Copy-holder for life might nominate his Successor, and is good, and so for the second, that such Copy-holder may cut and sell all the Trees growing upon his Copy-hold, and he conceived that the validity of the custome, ought to be adjudged by the Judges, and the Truth of that by the Jury, and when it is found true by a Jury, and that it hath such antiquity that exceeds the memory of man, then this obtaines such priviledge as the Prerogative of a Prince, and is part of Law, and stands with it, and this is reasonable custome, and so it hath been adjudged in the Kings Bench, the reason is, inasmuch that the custome is the life of the Copy-hold, upon which that depends, and the party is but a *Conduit* to nominate the Tenant, and when he is nominated and admitted then he takes by the Lord, and that stands with the rules and reasons of the Common Law, that is, that a man devises that a married wife shall sell his Land, and she may sell notwithstanding the Coverture, for she upon the matter nominates the party, and he takes by the Devise, and by this reason, *she may sell to her Husband as it is agreed by the 8 of Assises*. And also by devise that Executor shall sell, Executor of Executor may sell, notwithstanding that he is not in *Esse* at the time of the Devise, and so a Lease for life to one, Remainder to him that *J. S.* shall nominate is good after nomination, and then he takes by the first Livery, as it is agreed in 10 H. 7. and *J. S.* Only hath the nomination, and nothing passes to him, and with this also agrees 43 Ed. 3. 19 H. 7. So if a man makes a Feoffment to the use of himself for life, with diverse Remainders over, and power to himself to make Leases for three lives, this is good, as it is agreed in *Mildmayes Case* and *Whitlocks Case*, 8 Coke, and yet the Estate doth not passe from him but out of all the Estates, and he upon the matter hath only the nomination of the Lessee, and of the lives, for all the estates apply their forces to make that good, and the 2 El. Dyer 192. 23. Custome that the Wife of the Copy-holder for life shall have her Widdows Estate, is allowed to be a good custome, and there an Estate for life upon the matter is raised out of the estate for life, and annexed to it, and this is by the Custome, and the reason he conceived to be for that that Women should be encouraged

to marry with their Tenants, and by that the marriage with the Tenant, and the custome in this Case doth bind the Lord, and so 4 Coke, there are divers customes by which the Lord is bound, and the 8 Coke Swaines Case, where the Copy-holder by custome hath the Trees, in Case where the Lord himself hath them not, so if the Lord sell the Waste, yet the Copy-holder shall not loose his Common in that, notwithstanding that the Estate of the Copy-holder be granted after the Waste is severed from the Mannor, and it is agreed in Waggoners Case 8 Coke, that custome is more available then the Common Law: And for that this case hath been adjudged in this point between Crab and Varney by three or four Judges, he would not further question it. And for the second custome, he agreed that one bare Tenant for life, could not meddle with the Sale or falling of the Trees, but here is a Copy-holder for life which hath Aut ority given by the Lord, and the Custome to dispose the Trees; and he saith that Bratton and the old Laws of England calls Copy-holders Falkland, and saith they cannot be moved, but in the hands of the Lord they ought to surrender, and agreed that this is within the Rules of the Common Law, for *Consuetudo privat communem legem* and the Law doth nor give reason of that, for this is as a ground, and need not to be proved, for the reason of every custome cannot be shewed, as it was sayd in Knightly and Spencers Case, and he sayd, that Mannors are divided into three sorts of Tenures.

Falkland;  
what is so call-  
led.

The first holds by Knights Service, and this is for the defence of the Lord, and they have a great number of Acres of Land, and pay less Services.

The second holds by Socage, and this for to plow and manure the Demesnes of the Lord, and they shall pay no Rent nor do other services, and this was at the first to draw such Tenants to inhabit there, and for that they have Authority to dispose and sell the Trees growing upon their Tenements.

The third, holds by base Tenure, and these were at the Will of the Lord, and these were to do Services, and then these in many Cases have liberty for their Wives in some cases to dispose that for another life, and to dispose the Trees, and so it is in Ireland at this day, where some give more and greater priviledge then others, to induce Tenants to inhabit and manure their Land, for there every day is a complaint made to the Councell for inticing the Tenants of the Lord, and 14 Ed. 3. Bar 277. The Tenant prescribes to have the Wind-falls, and if the Lord cut the Trees, that he may have the Lops, and 11 H. 6. 2. The Keeper of the Wood prescribes to have Fee, and 46 Ed. 3. is prescription to stint the Lord in his own Soyl, and all these are for the Incouragement of Tenants to inhabit upon the Land, and time of Ed. 1. Prescription 75. A stranger prescribed to have all the

profit of the Land of another, for a great part of the year, and to exclude the giver of the Soyl, & 67a. *It was adjudged in the Kings Bench between Henrick and Pargiter*, that the Lord may be stinted for Common in his own Laud, and in the Book of Entries 563. *It appears that by Custome* Copy-hold granted, *Sibi & suis*, was a good Fee-simple, and the reason of all this is shewed in the 4. Coke, amongst his Copy-hold Cases, *where it is agreed that the Life of a Copy-hold Estate is the customes*, and then if the Custome gives life to the Estate, this gives life also to all the Priviledges which are incident to the Estate, and the Lord is but the means to convey the Estate from one to another, and as in 38 Ed. 3. A man hath a House as Heir to his Mother, and after a stranger grants *Eftovers* to him and his Heirs to be burnt in the same House, these *Eftovers* shall go to the Heirs of the Mother, inasmuch that they are incident to the House, so of Priviledg incident to a Copy-hold Estate by the Custome, and at the Common Law, if Tenant for life hath cut the Trees, he hath not forfeited his Estate, for he was trusted with the Land, and was not punishable till the Statute of Gloucester, and at this day if there be a mesne Remainder for life which remains in Contingency, and that shall prevent that the Tenant shall be punished for this waste, and to make innovation of this custome, will be dangerous, and for that he concluded that the Plaintiff shall be barred.

Warburton.

Warburton Justice agreed: And the first Custome, that is, for the nomination of the Successor, he conceived that it is good, and that it is good by the Common Law, and good by Custome by the Common Law, as a Lease for life, remainder to him which the Tenant for life shall name: So by Custome as the Custome, that if a Copy-holder will sell his Copy-hold Estate, that he which is next of blood to him shall have the refusall, and if none of his blood, then he which Inhabits in the neereft part of the part of the ground shall have it before a stranger, giving for that as much as a stranger would, and the Lord shall have him for his Tenant, whether he will or no, for it shall be intended, that so it was agreed at the first, and it is reasonable; and if it had not been ruled and adjudged before, yet he conceived it might now be a rule and adjudged, inasmuch that it is so reasonable and good, and for the second custome, that is for the custome of cutting of Trees, by such Copy-holder which hath such priviledge, he conceived also that it was good: But he agreed that a bare Tenant for life cannot be warranted by custome to do such an Act, as it was here adjudged between *Powell and Peacock*: But here he had a greater Estate then for life, for he hath power to make another Estate for life, and shall have as great priviledge as Tenant after possibility, &c. which is in respect of Inheritance which once was in him, and he may do it for

for the possibility which he hath to give to another Estate, as it is agreed in 2. *Ed.* 4. that a Lease for a hundred yeares is Mortmain, in respect of the continuance of it, so here, for the Estate may continue by such power of nomination for many lives in perpetuity, and that as when at the Common Law they have in reputation and opinion of Law a greater Estate, may cut and sell Trees, so here insomuch that the Estate comes so neere to Inheritance, he conceived that he might cut the Trees by the custome, and that the Custome is good; and so he concluded, that Judgement should be given, that the Plaintiff should be barred in respect of Customes; and then to the third, that is, when a man lets Land, and by the same Deed, grants the Trees to be cut at the will and pleasure of the grantee, there the Lessee hath distinct Interest: But if the Lessor by one selfe same clause had demised the Land and the Trees, there the Intendment is: But notwithstanding that there are severall clauses, and that he hath distinct Interests, yet he conceiveth that the Trees remaine parcell of the Inheritance and free-hold till they are cut and are severed only in Interest, that is, that may be felled and devided by the Axe, for Tythes shall not be paid for them if they exceed the growth of twenty yeares, nor it shall not be Felony for to cut those and burn them: And it is not like to an Advowson, for that may be severed, and for that he conceived that if the Custome had not warranted the Cutting and Selling, that the Copy-holder had forfeited his Estate, and that the Lord might very well have taken advantage of it, and 29. *assise*. 29. A man sells Trees to be cut at *Michaelmasse* insuing, and before *Michaelmasse* Haukes breed in them, the seller shall have them, by which it appeares that the property is not altered: So that though they are not parcell of the Mannor, yet they are parcell of the Free-hold, insomuch that they are not severed in *Facto*: And he agreed that Lessee for yeares of a Mannor shall take advantage of Forfeiture, and need not any presentment by the Homage, and *Littleton* fol. 15, saith, that the Lord may enter as in a thing Forfeited unto him; and so for attainder of Felony: And if a Copy-holder makes a Lease for yeares, by which he forfeits his Copy-hold Estate: And after the Lord grants the Mannor for yeares, the Lessee of the Mannor shall take advantage of this Forfeiture made before he had any Estate in the Mannor without any presentment by the Homage: But here in this case the Custome warrants the cutting of the Trees by the Copy-holder, and for that he concluded all the matter as above, that the Plaintiff should take nothing by his Writ.

Coke cheife Justice agreed, and he said that *Fortescue* and *Littleton*

Coke.

ton



son, and all others agreed, that the Common Law consists of three parts.

First Common Law.

Secondly Statute Law, which corrects, abridges, and exp'aines the Common Law : The third Custome which takes away the Common Law : But the Common Law Corrects, Allows, and Disallows, both *Statute Law*, and *Custome*, for if there be repugnancy in *Statute*; or unreasonableness in *Custome*, the Common Law Disallows and rejects it, as it appears by Doctor *Bonhams* Case, and 8 *Coke*, 27. *H. 6. Annuity* : And he conceived that there are five differences between Prescription and a Custome : And all those as pertainent to this cause.

First in the beginning, *Pugnant ex Diametro*, for nothing may be good by prescription, but that which may have beginning by grant, and also prescription is incident to the Person, and Custome to some place, and holds place in many Cases, which cannot be by grant; as in 11. *H. 4.* Lands may be devised by Custome, and so discent to all the Sons, as in Gavelkind, and to the youngest Son in *Eurrough English*, and others like, which cannot have their beginning by Grant, but prescription and Custome are Brothers, and ought to have the same age, and reason ought to be the Father, and Congruence the Mother, and use the Nurse, and time out of memory to Fortifie them both.

Secondly they vary in quality, for prescription is for one man only, and Custome is for many, if all but one be not dead.

Thirdly they vary in extent and latitude, for prescription extends to Fee-simple only, but Custome extends to all Interests and Estates whatsoever, as appears by pleading, for Tenant in tail, for life or yeares cannot prescribe in what Estate, nor against the Lord in his Demesnes, but they ought to alledge the Custome, and against a stranger they ought to prescribe in the name of the Lord, and for that prescription *b.* Copy-holder of Inheritance may sell the Trees, is not good, but such Custome is good, and 5. *Ed.* 3. 24. And the old Reports 196. One Tenant being a Free-holder prescribes to have Windfalls, and all Trees which are withered in the Top and if the Lord makes them in Cole, to have so much in money : And so if they sell, and this for Sale, and this was not good, inasmuch that it is alledged in the person as prescription, but if it had been alledged as Custome, and to be burnt in his house, then it shall be good as appendant, and 14. *Ed.* 3. *Barr* 227. *Wilby* saith to be adjudged that prescription to have Turbary to be burnt in his house is good, but not to sell; and 11. *H.* 6. 17. accordingly, by which it appears that this may be very well by Custome, and cannot be by prescription.

Thirdly

Thirdly he conceived that where a man may create an Estate without nomination, there he may create that by nomination: And also that which may be done by the Common Law, may be done by Custome, and that an Estate may be created by such nomination, it appeares by the case, where a Remainder is Limited to him, which the first Tenant for life shall nominate, and it is very good, and to prove that the Custome is good, he remembered the custome of *Millam in Norfolk*, where he was borne, that is, that if any Copy-holder will sell his Land and agree of the price, that at the next Court when a surrender is to be made, the next of his blood, and if he will not any other of his blood may have the Land, and so every one shall be preferred according to the neerenesse of his blood, and with this also agreed the Leviticall Law, as it appeares, *Leviticus* 25. chap. verse 15. which appoints this to be at the yeare of Jubile, and the Common Law within one yeare after the Alienation, and upon this he infers, that if Custome may appoint Heire in the life of the party, then *a Fortiore*, he may appoint Successor after his death, and he conceived that at the beginning, the Copy-holders might have had absolute Fee-simple of the Lord, and they rather made choice to have such Estate, insomuch that they did not know, if their Children would be towardly or not, and for that content themselves with the nomination of a Successor only, and so is the Custome at *Hamm* also in *Middlesex*, if any Copy-holder will sell, the next *Cleivener*, which is he that dwelleth next unto him, shall have the refusall, giving so much as another will, and he which Inhabits one the *East* part first, and the *South* and the *West*, and last the *North* shall be preferred, is the only way in his course, and there the Successor is nominated by the Heavens, and by the quarters of the Earth, and so is the custome in *Glocester*: And if any Husband hath an Estate for twelve yeares, his Wife shall have it for twelve yeares also, and so *ad Infinitum*, and this makes nomination; and so of Free-hold, and so if it be good without nomination, it shall be good by nomination: And if the Estate determine by the Death of the Tenant, without nomination when the Lord revives the Copyhold Estates, the priviledge also shall be revived: But he conceived that the Tenant cannot nominate part to one and part to another, nor that divided in fractions: And he saith that this point hath been adjudged in the Kings Bench by foure Judges against *Popham* 5. *Jacobi* between *Ball* and *Crabb*: And so he concluded this point, and to the second custome he said, he would speake to that *Transitive*, but not *Definitive*, and that it hath been adjudged 45. *Eliz.* between *Powell* and *Peacock* that bare Copy-holder for life, could not prescribe to cut and sell the Trees, otherwise of Tenant in Fee-simple, for he hath them cherished and fostered: And it is  
against

against common reason, incongruent and against the Common Law, that a Copy-holder for life may cut and sell the Trees, and custome ought to have reason and congruence, for 10. Ed. 3. 5. *Leete cannot be belonging to a Church, insomuch that it is Incongruent*, and so in *Writes Case 2. Coke* Tythes cannot be appurtenant to a Mannor, insomuch that it is incongruent; and a spirituall thing shall not be pertinent to a temporall, and so *à Converso*: And so in the 5. *Affis. 9. and Hill and Granges Case, Com.* Turbary cannot be appurtenant to Land, insomuch that it is incongruent, but it ought to be to a house; so in time of Ed. 2. Tenant of the Mannor prescribes to have free Bull and Bare, and it is not good for the reason aforesaid, otherwise it is of the Lord of a Mannor, and 9 H. 5. 45. custome in *Leete* to present common, and adjudged that it is not good, insomuch that it wants congruity, for it is not proper to the Court, and upon this he concluded that bare Tenant for life cannot prescribe to cut Trees, for it is not congruent that such an Estate shall have such a priviledge, and this for three reasons.

First insomuch that Trees growing are parcell of the Inheritance.

Secondly in respect of the perdurableness of them, for it shall be intended that they will indure for ever, and so will not his Estate, for this is as a shadow, as *Job* said, and 'tis absurd that shadow should cut downe the Tree: And also it is for necessity of habitation and Plow and Husbandry: And it is for the Common Wealth, that Copy-holder of Inheritance might cut them by such custome, for otherwise he would not be incouraged, to plant and preserve them: And notwithstanding that in this Case the custome be general, that the Copy-holder may cut down all, yet that shall have a reasonable construction, and that this notwithstanding he leave sufficient for House-boot; as if a man grants Common without number, yet the Grantor shall not be excluded, but shall have his Common there, for excesse shall not be allowed.

As if a man which distraines another for Rent he shall not take excessive distress, the *Lessee for life excessive Tallage of villaines*, nor upon excessive Fines of Copy-holders, and so it was adjudged in *Heyden and Sir John Lenthorps Case*, that the Lord shall not take all; but leave sufficient for reparations, and so was the opinion of *Wray cheife Justice in the 33 of Eliz.*, In evidence to a Jury, but here he is in nature of Tenant in Fee-simple, and it shall be intended that he hath cherished the Timber, and every Copy-holders Estate granted is as a new Grant, and hath affinity with Tenant in Fee-simple, and he agreed that if *Lessee for life*, the Remainder for years, Remainder for life be, and the first *Lessee for life* makes a forfeiture, he in Remainder for years shall take advantage of that, and that it hath

hath been adjudged, that the Lord of the Mannor shall take advantage of forfeiture made by the Copy-holder, *without presentment made by the Homage*, and in one *Bacon and Flotims Case*, and so *Lessee for yeares of a Mannor shall take advantage of Forfeiture, notwithstanding the Imbecillity of his Estate*, but the principall matter upon which he relyed was, that the *Trees were severed from the Freehold*, and if the *Lessee* dy, his Executors shall have them, inso much that they are meer Chattells, and this.

First in respect of the Words of the Lease, that is, demise, and to farm let the Mannor, but bargain, sell, give, and grant the Timber Trees to be felled and carried away at his Will: As if a man makes a *Lease* for years, except the Wood, and after grants the Trees, the Lease determines, the Lessor shall not have the Trees again.

Secondly, They are in two divided Sentences, and also in respect of divided properties, *for the Executor of the Lessee shall have them; and Quando duo jura, concurrunt in una persona, eorum est ac si esset in diversis*, also past at severall times, for the Trees pass by the delivery of the Deed, and the Land doth not pass till Livery and Seisin be made. Also the intent of the parties is not that they shall pass together, for if the intent were otherwise the Law would not devide them, as it was adjudged *Hillary 15. Eliz. in the Lord Cromwells case*, where Tenant in Tayl was of a Mannor, with the Reversion to his right Heirs, and he by his Deed gives and grants the Mannor, and the Reversion of that, and includes Letter of Attorney within the Deed to make Livery, but Livery was not made, and yet the Reversion doth not pass, for his intent appears that it should pass by Livery and Seisin, and not by grant; and also in *Androwes case*, the Advowson appendant to a Mannor shall not pass without enrolment of Bargaine and Sale, yet there were words there, that that might passe by Grant, for this was against their intent, otherwise if a man makes a Lease for life or years of a Mannor, and grants the Inheritance of the Advowson by the same Deed, and so of the case of 23 *Eliz. Dyer* 374. Lessor deviseth, Grants, and to farm lets the Mannor and the Trees, and they passe joyntly; and the Reason is inso much that it is but a Joynt sentence, and not severall as it is here, also he intended, that the life of the Lessee for life is not averred, and for that he shall be intended to be dead, and for that it is a severall grant of the Trees of the Freehold, for the Interest of them is settled in his Executors, for if he had made Sale of them before that the Copy-holder had cut them down, then that had not been forfeiture, see 5. H. 7. 15 Ed. 4. 14 *Eliz. Dyer*

And then the Case is this, Tenant for anothers life of a Mannor, makes a Lease for yeares of the Freehold, of which an Estranger hath a Copy-hold Estate for life in esse, Lessee dies,

D d

and



*Quod non occupantur conceditur.*

and he conceived that the Copy-holder shall not be an occupant, for it ought to be *Vacua Possessio*, and this was the reason of the judgment in *Adams Case* in 18 Eliz. Where a man makes a long Lease for years, and after intending to avoyd this Lease, makes a Lease to another old man for anothers life, to the intent that the Lessee for yeares should be occupant, when the old Lessee died, and so drowned his Term, and after the Lessee died, and resolved that the Lessee for years shall not be an occupant, insomuch that there was not *Vacua Possessio*, and for this it seems to him that if Lessee for anothers life, makes a Lease for years and dyes, that the Lessee for yeares shall not be an occupant, notwithstanding that he made speciall claim, and that for the reason afore said, but he agreed that a Lessee for anothers life makes a Lease at will and dies, there the Lessee at Will shall be an Occupant, insomuch that his Estate is determined, and yet there is not *Vacua Possessio*, according to 38 H. 6. 27. But he did not say there should be an occupant in these cases, but cyted *Bracton fol. 8.* that if the Sea leave an Island in the midst of that, the King shall have it, and not *Occupanti conceditur*, and so he concluded that the Plaintiff shall be barred, and that Judgment shall be entred for the Defendant, which was done accordingly, and it was afterwards agreed, upon motion in this case, whether it would not make difference if the Trees were cut by the Copy-holder before that he hath made his nomination or not, notwithstanding it was objected, that when he hath made his nomination, then he was only bare Tenant for life, and the Priviledge executed, and he in Remainder was also Tenant for life only, for he cannot nominate till he comes to be Tenant in possession, but this notwithstanding, insomuch that they had power to make nomination, that is the first Tenant again, if the second died in his life time, and the second if the first died in his life time, and so the Priviledge continues, all the Justices continued of their opinions, and according to that Judgment was entred for the Defendant, and that the Plaintiff should be barred, and should take nothing by his Writ.

Trinity 8. Jacobi 1610. in the Kings Bench.

The Lord Rich against Franke.

*Debt against Administrator for Rent in the Debet and Detinet.*

THE Lord Rich brought an action of Debt against *Franke* Administrator of one *Franke*, and this was for a rent reserved upon a Lease for yeares, made to the Intestate, and the Action was brought in the *Debet and Detinet*, for rent due in the time of the Administrator, and verdict for the Plaintiff, and after moved in Arrest



Arrest of Judgment by the Councell of the *Defendant*, that this Action ought to be brought in the *Detinet only*, and not in the *Debet and Detinet*; and *Chibborn of Lincolnes Inne* conceived that the Action was well brought in the *Debet and Detinet*, and to that he sayd that *Hargraves case* 5 *Coke* is so reported to be adjudged, but he saith that he hath heard the councell of the other part insisted upon that, that this Judgment was reversed, and for that he would under favour of the Court speake to that. And hee conceived that the Action so brought, is well brought; for three Reasons.

*Chibborne.*

The first shall be drawn from the nature of the Duty, and to that the Case rests upon this doubt, that is, if the Administrator is now charged for this Rent, as upon his own duty, or as Administrator, and it seems to him not as Administrator, but as upon his own duty, for he saith, that it is not Debt nor duty till the day of payment, as *Littleton* takes the diversity in his Chapter of Release, between Debt upon an obligation and a Rent, and the day not being incurred in time of the Intestate, this cannot be his duty, therefore that ought to be duty in the Administrator, and to the cases of 19 H. 8. 8. Where the Executor of a Lessee for twenty years, which had made a Lease for ten years rendring Rent, brought action of Debt against the Lessee for ten years, for rent incurred in the time of the Executor, and this is in the *Detinet only*, and the Case of 20 H. 6. 4. Where an Executor brings an action of Debt upon Arrerages of Account of an Assignment of Auditors by themselves in the *Detinet only*, and he sayd that in these Actions, the Executors were Plaintiffs, and in all actions brought by Executors where they are Plaintiffs, and the thing recovered shall be Asset, the Action shall be brought in the *Detinet*, but in our case they are Defendants, and so the diversity, and to the Objection, that may be made to this Contract out of which this duty grows and arises, it was made by the Intestate, and not by the Administrator himself, and so this is a duty upon the first Privy of the contract, he answered that there is great difference, when a thing comes due by the Contract of the Testator alone, and ought to be payed in his time, in which the Executors are to be charged meerly as Executors, there the Writ shall be in the *Detinet*, but when the thing grows due in part upon the contract of the Intestate, and part by the Occupation of the Administrator, as in our case, there it shall be brought in the *Debet and Detinet*, & he cited a Case which was adjudged 26 El. in the *Common bench between Scrogs & the Lady Gresham*, where it was resolved that the Lady *Gresham*, was made chargeable to the Debts of her Husband by act of Parliament, and Action of Debt brought against her in the *Debet and Detinet*, and debated if this were well brought, and after

*Detinet only.*

Argument, adjudged that it was well brought in the *Debet and Detinet*, for though she was not chargeable for the Debts of her Husband, upon his own Contract, yet where an Act of Parliament hath made her chargeable, and a Debtor, and for that reason the Action shall be brought against her in the *Debet and Detinet*, and to the principal case he cited the Case of 1 H. 6. 7. Where it is said by Babington & Newton, that if a man be Lessee for years, and is in arrears for his Rent, and makes his Executors and dyes, and the Executors enter into the Land and occupy, in this case for the Arrearages due in time of the Testator, Action shall be brought against them in the *Detinet*, but for Rent due in their own occupation, the action shall be brought in the *Debet and Detinet*, for that it rises upon their own occupation, and with this agrees 20 H. 6. 4. And he said that he would demand this case of the Councell of the other part, that is, a man hath a Lease for yeares as Administrator, and Rent incurs in his time, and he makse his Executors and dyes, and Administration of the Goods of the Intestate is committed over to another, against whom shall the Action be brought for the Rent, that is, against the Executors of the first Administrator, or against the second Administrator: and it seems clearly to him, against the Executors of the first Administrator, for their Testator had taken the profits, which case proves that they shall not be charged merely as Executors or Administrators, but as takers of the profits, &c. And Occupiers of the land.

2.

Heire charged  
in *Debet and  
Detinet*.

And this was his second reason of the nature of Profits, inasmuch that they were raised by the personall labour of the Executor or Administrator, and are their Goods, as he said, and they have them not merely as Executors or Administrators, and for that the Action is well brought as it is, and he said, that the Heir for Debt of the Father shall be charged in the *Debet and Detinet*, and yet this was the contract of his Father, but he is charged in respect that he hath the land, and the occupation and profits of that, so here inasmuch that the Executors have the profit of the Term, by the same reason they shall be charged in the *Debet and Detinet*, and he resembled the case to a case put in Fitz. N. B. In his Writ of Debt, where a woman sole hath a lease for years, and takes a Husband, and the Rent incurs, and the wife dies, the Husband shall be charged in the *Debet and Detinet* for this rent, and the reason is, because he hath taken the profits, so here the Administrator hath taken the profits, and is not answerable for the Profits, unless they amount to more then the rent is. And by the same reason the action is well brought against him as it is.

3.

The third and last reason, was for the Inconveniency; and to that he said, if this Action be brought in the *Debet and Detinet*, there

there is no inconvenience, but if it should be brought in *the Detinet* only, then should the Administrator be charged but of the Goods of the dead, where if he be not charged of his own proper Goods, peradventure he shall not be so carefull to pay his rent; but would stop the Lessor in his Action, which should be trouble and vexation, and so by this reason also he concluded the Action well brought in *the Debet and Detinet*, and this was gaynsayd by *Towse, George Crooke, and Harris* of the other part, and it seems to them that it should be in *the Detinet* only, inasmuch that the cause of this Action growes of the contract of the Testator, and the Term is Assets in their hands, and the Administrator hath the Term as Administrator, and by the same reason the Occupation shall be as *Administration*: and by consequence he shall be charged as Administrator, and not otherwise, and then the Action shall be brought against him in *the Detinet* only, and that he shall be charged as Administrator they cited the Book of 14 H. 4. 28. Where it is sayd, if a man hath a lease for years and makes his Executors, and the rent incurs in their time, and action of Debt is brought against them, and they make default, he which first shall come by distress shall answer according to the Statute of 9 Ed. 3. chapter 5. which Book proves directly as they say, that they are charged as Executors, and not otherwise, and then it followes that the Action should be in *the Detinet*, so it seems to them that in all Actions, where they are named Executors or Administrators, that the Action shall be brought against them in *the Detinet* only, but in this action they ought to be named Executors or Administrators, for he doth declare of a lease made to the Intestate, and for that it seems it shall be brought in *the Detinet* only, and this was the reason of *Yelverton* Justice, which was of their opinion only against the other Justices, and to that which was sayd that an Action shall be brought against the Heir in the *Debet and Detinet* for the Debt of his Ancestor they answered, that this is now become the proper Debt of the Heir, but it is not so in the case of an Executor or Administrator.

*Towse, Crooke,  
and Harris.*

And it seems to *Towse*, that if an Administrator hath a Lease for twenty yeares, and makes a Lease for ten yeares rendring Rent, and brings an Action for this Rent, that the Action shall be brought in *the Detinet* only, for that this is a new contract made by the Administrator, and he hath gained new Reversion, because it was derived out of the Lease for twenty yeares, and so this shall be of the same nature, and the Rent shall be Assets in his hands, and in prooffe of this he cited the book in 17. Ed. 3. 66. Where an Executor sold the Goods of the Testator, and the Vendee made an Obligation to them for the money, and the Executors brought an Action of Debt upon the Obligation, and this was brought in the

*Detinet.*

*Detinet* only : And the exception was taken, because it was duty of their owne contract, and for that the Writ should be in the *Debet* and *Detinet*, and yet the Writ awarded good, because it comes in Lieu of Goods which they had as Executors, and shall be Assets in their hands as the Goods should have been, and for that it is well brought in the *Detinet* only : And they said that in the principall case it shall be mischeivous if the Action shall be brought in the *Debet* and *Detinet*, for it may be the Rent reserved, is of more worth then the Profits of the Land will amount unto, and that the Executors or Administrators have no other Assets, now shall be the Executor or Administrator be charged with his own proper Goods, which shall be mischeivous, and the case of 10. H. 7. 5. and 6. that is direct in the point was oftentimes cited, and all these three things which were of counsell with the Defendant, informed the Court that they were of Counsell with *Hargrave* when the Judgement given in the Kings Bench was reversed for Error in this very point, and for this cause, because the Action was brought in the *Debet* and *Detinet*, where it should be in the *Detinet* only : And so they praied that the Judgement should be hindered : But by the whole Court except *Yelverton* : And so it was adjudged, that the Action was well brought as it is, and especially for the reasons given in *Hargraves Case* 5. *Coke* 31. And to that which hath been said by *Yelverton* Justice, that in all cases where Executors are charged by the name of Executors or Administrators, that there the Action shall be against them in the *Detinet* only : *Flemming* cheife Justice answered, that true it is in all personall things, where they are named as Executors, Action shall be in the *Detinet* : But as it is an Action of Debt for Rent reserved upon a Chattell reall, and an Executor is as an Assignee in Law, and so charged as privy in Estate, and not meerely as Executor, and if he have no more Assets then the Rent, which he is to pay, he may plead nothing in his hands against all the World, and to that, that hath been said, that the Executor hath been charged of his own Goods : If the profits be not more then the Rent, or the Rent more then the profits, to this he said that in this case where the Executor hath the Tearme, and hath not any other Assets, that they may wave this Tearme : And in Action of Debt brought against him for the Rent may plead to the occupation, and that recover : The reason of the diversity between this case and the case of 28. H. 8. *Dyer* 14. is plain, for in an Action of Debt against the Termor himselfe ; *Non habuit nec occupavit*, is no Plea, for there was a contract between them, and for this privy of contract is the Lessee charged, though he did not occupy : But in the case of an Executor the privy of the contract is gone, and so may be a difference : But yet it seems

seemes if he have Assets sufficient to pay the Rent he cannot wave it: And to the case 14. H. 4. 28. that hath been cited that doth speake nothing, how the Action should be brought: And the Justices have seen the record of *Hargraves* case, and the Reverfall of that: And they said the same error which was in *Hargraves* case, is in this case, and for that bring your Writ of Error in the Exchequer chamber if you will, for we so adjudge: And then it was moved that the Lord *Rich* was Tenant in Tayle, of part of the reversion, and Tenant in Fee-simple of the other part, and so it seemes that he ought to have two Actions, because he hath as two reversions: But it was resolved by all the Court, that if a man have a reversion of part in Fee-simple, and of the other part in tayl, and makes a Lease for yeares rendring a Rent, he shall have but one Action, both being in the hands of one: But otherwise it had been if the reversion had been in severall hands they should not Joyne in Debt, and for that *Fenner* put this case; two Coparceners are of a reversion and they make partition, now the Rent is apportioned, and they shall sever in Debt: But if one dies without Issue, and the part descends to the other Parcener, now he shall have but one Action of Debt againe, and so it is if a man makes a Lease of two Acres rendring Rent, and after grants the reversion of one Acre to *J. S.* and of the other Acre to *J. N.* now they shall sever in Debt for this Rent, but if *J. S.* and *J. N.* Grant their reversions againe to the first *Lessor*, he shall have but one Action of Debt, and so the exception disallowed by all the Court, and the Judgement given for the Plaintiff, according to the Verdict.

## Tates and Rolles.

THE case was this, *J. S.* covenants by Indenture with *J. N. I. D.* and *A. B.* to enter Bond to pay ten pound to *J. N.* and *J. N.* dies, and his Administrator brings a Writ of covenant, and the question was inso much that this ten pound was to be paid to *J. N.* if his Administrator shall have Action of Covenant, or if the Action shall survive to the other two, and it was moved by *Stephens*, that the Action shall be well brought by the Administrator, for this shall be taken as a severall covenant, and this now is in nature of a Debt, and enures only to him which shall have it, also the payment of the money which is the effect of the covenant shall be to him only, Ergo the Damages for the not performing of it shall goe to him also, and by consequence to his Administrator: But it was adjudged inso much that this was a joynt covenant, that this shall survive to the others, and not well brought by the Administrator: So also resolved that inso much that the words are, that he would

Joynr Cove-  
nant shall survive.

enter



enter Bond, and doth not say to whom, that this shall be intended to the Covenantees, and though that the *Solvendo* is but to one of them, yet that is very good, as an Obligation made to three. *Solvendum* to one of them is good, by *Fenner and Williams*, Obligation to two, *Solvendum* ten pound to one, and ten pound to another, both ought to joine in Debt upon this Obligation, and Judgement for the Defendant.

*Sammer and Force.*

Copy-holder  
shall hold  
charge.

**T**he Case was this, The Lord of a Copy-hold Mannor where Copy holders are for life, grants Rent-charge out of all the Mannor; one Copy-hold Escheats, the Lord grants that againe by Copy; the question was, If the Grantee shall hold it charged or not; and by the whole Court but *Fenner*, he shall not hold it charged, because he comes in above the Grant; that is. By the custome; the same Law of Statutes, Recognizances, or Dowers; but the 10. of *Eliz. Dyer* 270. by the whole Court, that he shall hold it charged; but this hath been denyed for Law in a Case in the *Common Bench*, between *Swaine and Becket*, which see *Trinity* 5. *Jacobi*: But to *Coke* Justice it seemed, that if a Copy-holder be of twenty Acres, and the Lord grants Rent out of those twenty Acres, in the tenure and occupation of the sayd Copy-holder (and name him) There if this Copy hold Escheat, and be granted againe, the Copy-holder shall hold it charged, for this is now charged by expresse words.

*Trinity* 8. *Jacobi*, 1610. *In the Kings Bench.*

*Goodyer and Ince.*

Error.

*Elegit.*

**G**oodyer was Plaintiff in a Writ of Error against *Ince*, and the Case was this, *Ince* brought an Action of Debt upon an Obligation in the *Common Bench* against *Goodyer*, and had Judgment to recover, and by his execution prayed an *Elegit* to the Sheriff of *London*, and another to the Sheriff of *Lancaster*, and his request was granted, and entred upon the Roll, after which went out an *Elegit* to the Sheriff of *Lancaster* upon a *Testatum*, supposing that an *Elegit* issued out to the Sheriff of *London*, which returned *Nulla bona*, and *Quod Testatum sit, &c.* That the Defendant hath, &c. in your County, &c. upon which *Elegit* upon this *Testatum*, the Sheriff of *Lancaster* extended a forme of the Defendants in a grosse sum of a hundred pounds, and delivered this to the party himselfe, which sold that to another; and now the Defendants brought a Writ of Error, and assigned for Error, that this *Elegit* issued upon a *Testatum*,

*sum*, where no Writ of *Elegit* was directed to the Sheriff of *London*, and so this Writ issued upon a false supposal, and upon that two points were moved in the Case :

*Testatum  
where no Writ  
had issued.*

First, As this Case is, if this were Error in the Execution or not.

Secondly, Admit that it were Error, if the Plaintiff shall be restored to the tearme againe, or if to the value in Money ; and it was moved by *Davenport of Grayes Inne*, that this was no Error ; and to that he took this difference, That true it is, when a man brings an Action of Debt in *London* and hath Judgment, that without request of the Plaintiff he is to have his *Elegit* to the Sheriffs of *London*, where originally the Action was brought ; and in such Case he cannot have *Elegit* to the Sheriff of another County, without surmise made upon the returne of the first *Elegit*, and the surmise ought to be true, or otherwise it is Error ; but where upon the request the *Elegit* is granted to both Counties at the first, and so entred upon the Roll : It seems to him that insomuch that he may have both together, that if the surmise be false, that this is but a fault of the Clarke, which shall be amended, and shall be no Error ; and to that he cyted the Case of 44 *Edw. 3. 10.* Where an *Elegit* issued upon a *Recognizance* of a hundred Markes, and the Writ of *Extent* was a hundred pounds, and the Sheriff extended accordingly of the Land of the Defendant, and he came and shewed this to the Court, and praied that the Writ should abate, and a new Writ to the Sheriff, that he might have restitution of his Tearme, and *Thorpe* said this is but a misprison of the Clark, and the Roll is good, and he shall have the Land, but till the hundred markes are Levied, and after this you shall have restitution of the Land, which case proves as he conceives, that if the Roll warrant a writ in one manner, and the Clark makes it in another manner, that this shall not be Error, and so in this case the Roll warrants an *Elegit* originally to the Sheriff of *Lancaster*, and though that this is made upon a *Testatum*, this shall not be Error, because warranted by the Roll : And to the second point he would not speake, for if that were no Error, the second point doth not come in question.

*Hillary 7. Jacobi 1609. in the Kings Bench.*

Marſam againſt Hunter.

**I**N Trespasse the case was this, Copy-holder of a Mannor, with-  
in which Mannor, the custome was that the Copy-holders  
should have Common in the wast of the Lord : The Lord by Deed  
confirms to a Copy-holder to have to him and his Heires with the  
appurtenances, and the point was insomuch that his Copy-hold

*Confirmation to  
a Copy-holder,  
destroys Com-  
mon.*

E c

was

was now diſtroied, whether he ſhall have his Common or not. And *Davyes* of *Lincolnes* Inne, argued the Common is extinct, and his reaſon was, that this Common was in reſpect of his Tenure and the Tenure is diſtroied, *Ergo* the Common, and he cited the caſe of 5 *Ed. 4. fol. nlr.* Where the office of the King of *Herraulds* was granted to *Garter* with the Fees and profits, *Ab Antiquo*, and alſo ten pound for the office, and there it is reſolved if the office be determined, the Annuity is determined alſo, and the caſe in 7. *Ed. 4. 22. b.* Where an Annuity was granted to *John Clark* of the Crown, and for Terme of life, and after he was diſcharged of the office, and the oppinion of the Juſtices then was, that the annuity was determined, and in 19. *Ed. 3. Affiſ. 83. 12 Affiſ. 22.* A man gives Land to his Daughte and *L. S.* within the years of marrying, in frank-marriage, the Husband ſues Divorce, the marriage being diſſolved, the Wiſe from whom the Land firſt moved ſhall have the Land againe, ſo in the principall caſe, inſomuch that this common was in reſpect of Tenure, the Tenure being diſtroied, the common is gone, and this was all his argument, and he prayed Judgement for the Plaintiff, and another day *Brauntingham* of *Grayer Inne* ſeemed that the common remains for three reaſons.

First of the nature of a preſcription, and to that there are three manner of preſcriptions.

First perſonall preſcription, and in that Inhabitants may preſcribe, as for a way or matter of eaſe, as it is ſaid in 7. *Ed. 4. 15 Ed. 4. and 18. Ed. 4. and 6. Coke, Gatwoods caſe.*

Secondly reall preſcription, and this is Inherent to the Eſtate, and this is where a man preſcribeth that he and all thoſe whoſe Eſtate he hath, &c. Thirdly, locall preſcriptions an that is, where a man preſcribeth to have a thing appendant or appurtenant to his Mannor, and this is ſo fixed to the Land, that whetherſoever the Land goes, the preſcription is concomitant unto it, and it ſeemes to him that this common is annexed to the Land by preſcription and ſo locall, and cannot be ſeperated but alwaies ſhall go with the Land, into who ſoever hands that comes, (but *Dixit non Probat* : ) And for this he ſuppoſed that the cuſtome of Copy-hold is that the Copy-hold ſhall diſcend to the youngeſt Son, if the Copy holder purchaſe the Free-hold and the Fee-ſimple of the Copy-hold, ſo that this is made Free-hold, this ſhall diſcend to the youngeſt Son; ſo if a Copy-holder by cuſtome is diſcharged of payment of Tythes in kind, ſo the office of the maſter of the Rolles hath many liberties pertaining to it, and this is granted but *Durante placito*, yet if the King grant that in Fee as he may, yet he ſhall have all the Fees and Priviledges annexed to that, and ſo it ſeemes to him that this common being annexed to the Land, though that the Eſtate be increaſed,

ed, yet the common remaines, his ſecond reaſon was of the manner of conveyance, and that was by confirmation, and if that conveyance had been by Feoffment, peradventure the common had been gone: But a confirmation enures allwaies upon an Eſtate precedent, and though that this ſometimes enlargeth the Eſtate, yet this doth not alter the Eſtate, as to any priviledges annexed to it, his third reaſon was of the matter of the confirmation, and that is; that he hath confirmed it with the appurtenances, and this ſeemes to him, admitting that the common had been extinct, yet theſe words with the appurtenances amount to a new grant of a common, as in the caſe of *Corody*, in 22, Ed. 4. 17. and 18. If the King grant to one ſuch a Corody as *I. S.* had, he ſhall have ſo much bread and beere as *I. S.* had, ſo here when he grants and confirms that with the appurtenances, this is with all ſuch priviledges as *I. S.* had; ſo here when he confirms with the appurtenances, this is with all the priviledges that the old Eſtate had, and ſo this ſhould be a grant of ſuch common as was annexed to that, and ſo it ſeemed to him for theſe reaſons that the common remaines: to which it was ſaid by *Davies* of the other part, that he agreed al the manners of Preſcriptions, but he denied that it was a locall Preſcription, that is to Land, but only to an Eſtate, and this proves well the words of the Preſcription, for the Copy-holder ought to preſcribe, that is, that every cuſtomary Tenant within the Mannor, &c. So he hath his common in reſpect that he is cuſtomary Tenant, and this is in reſpect of the Eſtate which he hath by the Cuſtome, and not in reſpect of the Land, and that this ſhall not enure as a new Grant, he cited a caſe to be adjudged *Michaelmaſſe* 43. and 44. *Eliz.* in the Kings Bench, *Rot.* 367, Where in Treſpaſſe, the Defendant juſtifies the lopping of Trees in the waſt of the Lord, where the cuſtome was that every Copy-holder might ſhride the Trees in the waſt of the Lord, and that he was a Copy-holder there, and the Lord granted to him the Inheritance of his Copy-hold, with all ſuch Lands, Tenements, and Commons of Eſtovers pertaining to the Copy-hold, and adjudged that inſomuch that the Cuſtomary Eſtate was diſtroyed, this cuſtome was not now annexed to the Land, but being determined with the Eſtate cannot be ſaid appertaining to it, and for that the Juſtification ill; and it ſeemed to him to be all one with the principall caſe and it was adjourned, and after in *Michaelmaſſe* Tearme 8. *Jacobi*, It was adjudged that the Common was extinct and not revived.

Hillary 7. Jacobi 1609. In the Kings Bench.

Proctor against Johnson

*Expresse Covenant qualifies Covenant in Law.*

THE Case hath depended seven yeares in this Court upon a Writ of Error, was this; Two Joynt Tenants for yeares of a Mill, one grants his Estate severally to another and dies, the Grantee doth not enter yet: The other reciting the Lease to him made and to his companion joyntly, and that his companion died, so that all belonged to him as Survivor (as he intended) grants all the Mill to *Johnson*, and all his Estate, Right, and Interest in that: And covenants that the Grantee there shall continue discharged and acquitted of all Charges and Incumbrances, or other Act or Acts done by him, and after binds himselfe in a Bond to performe all Grants, Covenants, and Agreements, contained in the Indentures, according to the intent and meaning of the parties, and after the Grantee of his companion entered into the halfe, and the question was, If the Bond were forfeit or not; and it was adjudged in the Common Bench that the Obligation was forfeited: And the matter was argued this Term in this Court by *Telverton of Grayes Inne*, that the Bond shall not be forfeited, for the Bond was with Condition to performe all Grants, &c. According to the true intent and meaning of the parties, and then let us see what was the intent of the parties, and suerly this appeares by the recitall in the Indenture, and for that he said that all appeares to him as survivor (as he conceived) so that he was doubtfull of that, and for that his meaning was, that if he had all, then to grant all; and if he had but a moiety, then to grant but the moiety, and this proves well the words subsequent; where he saith that he granted the Mill (and all his Estate, Right and Interest in that,) so that he did not intend to grant more then his Estate, and these words subsequent qualifie the generall words precedent, and so it seemes to him that the Obligation shall not be forfeited.

And Sir Robert Hitcham the *Queens Attorney* to the contrary, and that the Bond was forfeited, for he hath bound himself to perform all grants, and he hath not performed his Grant, for he granted all the Mill, and then though but a moiety passeth yet he shall forfeit his Bond, if the moiety be evicted, and for that if a man which hath nothing in the Mannor of *D.* makes a Lease by Deed indented to *J. S.* and binds himself to performe all Grants, though that nothing passes, yet if he enter and be ejected he shall have Debt upon his Obligation, and he cited one *Telvertons Case* to be adjudged, but did not tell when, where a man which hath nothing in the Mannor of



of Dale, covenants with J. S. to stand seised to the use of him and his Heirs at Michaelmas, and before Michaelmas he purchases the Mannor of Dale, and it was resolved that no use shall be raised at Michaelmas, for he had not the Mannor at the time of the Covenant, and also it was resolved that no Action of Covenant lies upon the Covenant, but he sayd that it is a cleer Case, that if he had entred into a Bond to perform all Covenants in the Indenture, that the Bond shall be forfeited, though that he could not have action of Covenant upon the Covenant, and also he sayd, that he well agreed the Case of the Lady Russell, which was adjudged also (*but Nescio quando*) where a man made a Lease for years of the Mannor of Dale except one Acre, the Lessee binds himself to perform all agreements, and after the Lessee enters into the Acre, this shall be no breach of the condition, for this exception is no agreement, for nothing shall be sayd an agreement in an Indenture but that which passeth in Interest, and so he sayd that though that the Lessee cannot have an Action of Covenant in the principall Case, inasmuch that this is so speciall, yet the Bond shall be forfeited upon these Words, grants, and agreements, and the Covenant special doth not qualify the generall expresse grant; and after four Justices, that is Flemming the cheife Justice, Williams, Telverton, and Croke, were of opinion that the Bond is forfeited, and this for the generality of the Grant, & his Intent was cleerly to pass all, but Williams, if he had sayd, *Totum Molendinum suum*, or all his Estate in the Mill, there peradventure it should have been otherwise; and so a difference where he saith he grants the Mill and all his Estate in that, and where he grants all his Estate in the Mill, for in the first case all passes by the Grant of the Mill, and these words which are after, are but words explanatory, as Croke sayd; and it was adjourned.

And after in Easter Term next ensuing, Hitcham the Queens Attorney, came again, and prayed that the Judgment be affirmed, and Telverton of Grayes Inne sayd, that he hath considered of Nokes Case 4. Coke, and this was all one with this case, for the case was thus, A man lets a House in London by these words, demise, Grant, &c. That the Lessee should enjoy the House during the Term without eviction by the Lessor or any claiming from or under him, and the Lessor was bound to perform all Covenants, Grants, Articles, and Agreements, as our case is, and there by the whole Court, that the sayd expresse Covenant qualifies the generality of the Covenants by the Words Demise and Grant, which is all one with our case, for first he granted, *Totum Molendinum*, and after covenant that he should enjoy, &c. against himself, and all which claime, in, by, from, or under him, and after binds himself to perform all Grants, Covenants, Articles, and Agreements, and so it seems

to him, *that it is an expresse Covenant*, in this Case as well as in other, *and qualifies the generall Covenant*, implied by the word (*Grant*) and then the Grantee being outed by a title *Paramount*, no Action of Debt upon such Obligation, and prayed that the Judgment be reversed, and the Justices sayd they would consider *Nokes Case*, and the next day their opinions were prayed again, and the cheife Justice sayd that he had seen *Nokes case*, and said, that there is but a small difference between the cases, but he sayd that some difference may be collected.

For first in our case, is a Recitall of the *Estate of the Grantor*, that is, that all belongs to him as *Survivor*, and for that this was a manner of *Inducement* of the Grantee to be more willing, and forward to accept of the *Grant*, and to give the more greater consideration for it, but in *Nokes case* there is no recitall, and so this may be the diversity.

Secondly, In *Nokes Case*, the *Term* past all in Interest at the first, and the Grantee or Lessee, had once the effect of this Lease in Interest of the Lessor, but in this case when two Tenants in Common, and one grants *Totum melendinum*, there passes but a half at the first, and so the grant is not supplied for the other halfe, and then if the speciall Covenant shall qualify the generall, &c. The Grantee shall not have any remedy for a half at all, and this may be the other diversity, but admitting that none of these will make any difference, then he sayd that all the Court agreed, that this point in *Nokes Case* was not adjudged, but this was a matter spoken collaterally in the case, and the case was adjudged against the Plaintiff for other reasons, for that that he did not shew that he which evicted this *Term* had title *Paramount*, for otherwise the Covenant in Law was not broken, and for this reason Judgment was given against the Plaintiff, and not upon the other matter, and so the whole Court against *Nokes Case*: And the cheife Justice sayd, that to that which is sayd in *Nokes case*, that otherwise the speciall Covenant shall be of no effect, if it cannot qualify the generality of the Covenant in Law, he sayd that this serves well to this purpose, that is, that if the Lessor dyes, and any under the Testator claim the Estate, that the Action of Covenant in this case lies against his Executors, which remedy otherwise he cannot have, for if a man makes a Lease by these words (*Devise and Grant*) and dyes, Action of Covenant doth not ly against his Executors, as it is sayd in the 9. Eliz. Dyer 257. But otherwise upon expresse Covenant, and then this expresse speciall Covenant shall be to this purpose. And also it seems to him that if a man devise and grant his Land for years, and there are other Covenants in the Deed, that in this case if the Lessor binds himself to perform all Covenants, that he is not bound by his Bond to perform

form Covenants in Law, and he cited that to this purpose the Books of 22 H. 6. and 6 Ed. 6. *B. Tender*, that if a man makes a Lease for yeares rendring Rent, this is Covenant in Law, as it is sayd, 15 H. 8. *Dyer*, and a man shall have Debt or Covenant for that, and yet if a man binds himself in a Bond to perform all Covenants where there are other Covenants in the Deed, and after doth not pay the Rent, no action of Debt lyeth upon this Obligation, nor the nature of the Debt altered by that, and he sayd that the Monday next, they would pronounce Judgment in the Writ of Error accordingly, if nothing shall be sayd to the contrary, and nothing was sayd.

Hillary 7. Jacobi 1609. In the Kings Bench.

Bartons Case.

THE Case was this, A man was taxed by the Parish for Reparations of the Church, and the Wardens of the Church sued for this Taxation in the spirituall Courte: and hanging this Suit, one of the Wardens released to the Defendant all Actions, Suits, and Demands, and the other sued forward, and upon this the Defendant there procured a Prohibition, upon which matter shewed in the Prohibition was a Demurre joyned, and Davenport of Grays Inne moved the Court for a Consultation, and upon all the matter as he sayd the point was but this, If two Wardens of a Church are, and they sue in the Court Christian for Taxation and one Release, if that shall barr his Companion or not. And it seems to him that this Release shall not be any Barr to his Companion or Impediment to sue, for he sayd, that the Wardens of a Church are not parties interested in Goods of the Church, but are a speciall Corporation to the Benefit of the Church, and for that he cited the Case in 8 Ed. 4. 6. The Wardens of the Church brought Trespass for goods of the Church taken out of their possession, and they counted, *Ad damnum Parochianorum*, and not to their proper damage, and the 11 H. 4. 12 H. 7. 27. 43 H. 7. 9. Where it is sayd expressly, that the Wardens of the Church are a corporation only for the Benefit of the Church, and not for the disadvantage of that, but this Release sounds to disadvantage of the Church, and for that seems to him no Barr, also this Corporation consists of two persons, and the Release of one is nothing worth, for he was but one Corps, and the moyity of the Corps could not release, and for these reasons he prayed a consultation, and Yelverton to the contrary, and he took a difference, and sayd, that he agreed, that if the Wardens of the Church have once possession of the Church, there in Action of Trespass brought for these Goods, one Warden

den cannot release, but this tax for which they sue is a thing meerly in Action of which they have not any possession of that before, and there he cannot sue alone, and for that this release shall barr his Companion. And the Court interrupted him, and sayd, that cleerly consultation shall be granted, and Flemming cheife Justice, we have not need to dispute this release, whether it be good or not, and there is a difference where a suit is commenced before us, as if Wardens of the Church brought Trespasse here for Goods of the Church taken, and one Release, then we might dispute if this release were good or not, but when the matter is original begun before them in the spirituall Court, and there is the proper place to sue for this Tax and not any where else, we have nothing to do with this Release, and for that by the whole Court, a consultation was awarded.

Hillary 7. Jacobi, 1609. In the Kings Bench.

Styles Case.

Defendant re-  
enters after  
Possession deli-  
vered by Habe-  
re facias pos-  
sessionem,

UPon a Motion made by Tolverton on the behalfe of one Styles, the Case was this, Styles had a Judgment in *Ejectione firme*, and was put in possession by the Sheriff, by an *Habere facias possessionem*, and after the Defendant enters againe, within the two weeks after Execution, and the Writ was returned, but not Fyled; and Tolverton moved the Court for another Writ of execution; and by Williams he could not have a new Writ of Execution, but is put to his new Action, and the Fyling of the Writ is not materiall, for it is in the election of the Sheriff, if he will Fyle or returne that or not; but he sayd, if the Execution had not been fully made, as he sayd there was a Case, where the Sheriff made an Execution of a House, and there were some persons which hid themselves in the upper Lofts of the House, and after the Sheriff was gone, they came downe and outed those that the Sheriff had put in possession before; and in this Case a new Writ of Execution was awarded; but there a full Execution was not made, and so the difference: But the cheif Justice sayd; That if the Sheriff put a man in possession, and after the other which was put out enters in forthwith, that in this Case the Court may award an Attachment against him, for contempt against the Court.

Hillary

Hillary 7 Jacobi, 1609. In the Kings Bench.

Gittins against Comper.

CUSTOME of one Mannor was, That if any Copy-holder within the Mannor committed any Felony, and this be presented by the Homage, that the Lord may take and seise the Land; a Copy-holder committed Felony, and this was presented by the Homage, and after the Copy-holder was Indicted, and by Verdict acquit, and the Lord entred, and if his entry were lawfull or not, was the question: The points were two.

Customs among  
Copy-holders.

First, If the Custome were good.

Secondly, Admitting the Custome to be good, if this Verdict and acquittall shall conclude the Lord of his entry.

And *Walter* of the Inner Temple argued that the Custome was good, and that the Lord was not concluded by this Verdict: And to the first point he sayd, That it was a good Custome; First inso-much it might have a reasonable beginning, and for that he cyted the Book of 35 H. 6. where it is sayd, that such Customes which might have reasonable beginning should be good, and to that he cyted a Case which was adjudged, as he sayd, in 27 Eliz. and was one *Delves* Case, and the Case was this, A *Quo warranto* issued against *Delves*, to know *Quo warranto* he held a Leet, to which he pleaded, that he was seised of such a Messuage, and that he, and all those whole Estate he hath in the said Messuage have used allwaies to have and hold a *Leete* there within the Messuage: If this prescription, that is to have a *Leete* appendant to a single Messuage was good or not, was the question: And it was adjudged inso-much that by resonable intendment it might be that this house was the Scite of a Mannor, and the Lord granted that with the Leet, the Prescription adjudged good; and he sayd that many Customes are grounded upon the nature of the place, and for that he sayd that this Mannor was adjoyning to great Woods, and it might be that the Copy-holders committed Felonies and outrages, and after fled into the Woods, and there lived, and yet injoyed the benefit of their Copy-holds, and for that it was reasonable for the Lord to annex such a restraint and condition; that is, if they committed any Felony, this should be a forfeiture of their Copy-hold, and this should be a meanes to bridle them to commit such haynous and odious offences: And that Customes ought to have a respect to the place, he cyted the Case of 12 H. 3. where the Custome of the *Ile of Man* was, That if any man stole a Hen or a Capon, or such small

F f

matter,



matter, that should be Felony, but if he stole a Horse that should not be Felony, for a man may privily convey away a Hen or might consume it, but for the smalnesse of the place, and being compassed with the water, he could not so doe with a Horse; So in 39. H. 6. That the married Wife of a Merchant in London, may sue and be sued by the Custome, and the reason is that London is the cheife City and place of Merchandise within the Realme of England, and it is conceived that the Merchants cannot be alwaies resident there but sometimes beyond Sea, or other where about their businesse and Affaires, and for that it shall be reasonable that his Wife shall sue and shall be sued in his absence, and in time of E. 1. Title Prescription, the custome of Hallifax, that if any Felon be taken with the manner, he shall be forthwith beheaded, and this was as it seems for the better suppressing the common Felonies there committed, and so he concluded for this Reason, that this custome might have such reasonable beginning, and in respect of the place that should be a good custome.

His second Reason was, that this might begin at this day lawfully, Therefore this shall be good, and for that he cited the case of 10 H. 7. 11. That if a man make a Feoffment upon condition, that the Feoffee shall not commit Felony, that this is a good condition, but he sayd, that he supposed that if the Feoffee commit Felony, and the Feoffor enter into the Land, and after the Feoffee is attaint of this felony, that now the Lord shall enter by Escheate, and his reason was, that the Statute of Westminster 3. *De quia emptores terrarum*, prohibits any man to make a Feoffment, to the prejudice of the Lord, to his Wardship or Escheat.

His third reason was, that this was a good Custome, insomuch that this was annexed to an Estate created by custome, and for that he cited one Skeggs case to be adjudged in 24 yeare of Eliz. and was thus, that is, The custome of a Mannor was, that a married wife Copyholder might surrender to the use of her last will, and after might devise to her Husband, and it was adjudged, insomuch that this was annexed to her Estate which begun by custome, this was a good custome, and the 3 of Ed. 3. At the common Law such custome is voyd, and after he cited a Judgment in the point given in this Court, 23. of Eliz. Rot. 5014. or 504 or 5004. that the same custome was adjudged a good Custome: after he answered some objections which might be made against this custome, that is.

First for the uncertainty of the time when the presentment shall be by the Homage, and to that he sayd that the Lord may make that when he will, and the time doth not take away the offence, and no prejudice upon that discends to the Heir, but is to his advantage.

Secondly, Because no number certaine of the Homage, and that

that every tryall must be by twelve, and to that he answered, that we are not now in point of Tryall, but only for the information of the Lord.

Thirdly, this is against the nature of a Court-Baron to inquire of Felonies, *and to that he said, there is not any inquiry made here, but only to inform the Lord*, and such a thing is not against the nature of the Court which enlargeth this.

Fourthly, The offence is against the King, and a common person shall not have the punishment of that, *to that he said the King shall not have any benefit of it*, for he shall not have any Escheat of Copy-hold lands for Treason or Felony.

Fifthly, This is against the Kings Prerogative, *to that he said, that Custome may be against the Prerogative of the King*, as if a man claim Waife or stray by prescription, these are things given to the King by his Prerogative, and yet Prescription for them is good, and so he concluded this first point, that the custome was good.

To the second point he conceived, that this verdict and acquittall shall not conclude the Lord, *and for that he said, that at the Common Law, if a Verdict had been given and no Judgment upon it*, the party was not concluded to bring the same Action, 18 Ed. 3. 35. Then comes the Statute of 2 H. 4. And this ousts non-suit after verdict, and yet if verdict be imperfect, or finds a thing not in Issue, there non-suit may be after verdict, as it is sayd in 22 Ed. 4. 10. And if verdict be given in the point, and Judgment upon that, doth not conclude the party to have action of more high nature, as it is sayd in 3 Ed. 3. and 3 Affise 1. and *Hudsons case in the 4 Coke*, and as it is in Tryalls of Land, so it is in tryalls of life, as 2 R. 3. 14. 7 H. 4. 34. Then if the party himself shall not be bound by verdict, *A fortiori*, a stranger shall not be, also every Estoppel there ought to be a matter of estoppel, for the Jury is not sworn to give their verdict according to the truth in Deed, but according to the evidence to them given, and then if faint evidence or no evidence be given, it shall be hard *that this shall conclude any of his right*, also there is no party to be estopped because a stranger as is aforesayd, also the acquittall is in such manner, *that is, that he hath not committed the Felony in manner and form as in the Indictment is alledged*, and this doth not answer the Custome, because generall, *so it seems to him*, *that this shall not be any conclusion to the Lord, and so for both points the entry not congeable.*

And Stevens to the contrary, *and it seems to him* breisly that the custome was not good, and he denyed the Rule, *that is, that this might have reasonable beginning by agreement of parties shall make a custome good, and for this Littleton saith in his chapter of villainage,*

Non-suit after  
Verdict.

that if the Lord of one Mannor will prescribe to have Fines, if any of his Tenants marry their Daughters without his license, this is a void custome, and yet it may be such agreement between the parties at the first, and it seems the custome not reasonable, for it is too generall, that is; if any Tenant, and this doth not exclude Infants.

Secondly, if any Felony be committed; and this includes petty Larceny, and Maime by involuntary means, for these are Felonies, and for that see, 13 H. 7. 19. 6 H. 7. That in Appeal of Mayme, a man shall count Felony, and yet it shall be hard that a man shall loose his Land for these Felonies. Secondly, Homage cannot inquire of the fact of Felony, but of the conviction of Felony, and so it seems to him the custome ill, and to the other point it seems that the Lord shall be concluded, and to that that hath been objected that the Lord is a stranger to the verdict, and for that cause shall not be estopped, he said that the Lord is no stranger, for in this case every man is party, and every man may give Evidence for the King, and he cited the case in the time and title of Mortdancester, where the case was, where a man was as principall for the Death of J. S. and another as accessory in receiving the Principall, after the principall was out-Lawed, and the Accessary hanged, and the Lord seised the Land of the Accessary for Escheat, after came the principall and reversed the Out-Lawry, and was found not guilty, and the Heir of him which was hang'd, entered upon the Lord, and adjudged, insomuch, that there cannot be an Accessary, unless there be a principall; that the entry of the Heir was lawfull in this case, so he said in this case, insomuch that the Copy-holder is acquitted by verdict and found not guilty, and seems to him that the entry of the Lord should not be lawfull, and by the whole Court the custome was good, but they did not deliver any opinion upon the second point, for they moved the parties to Composition.

Hillary 7. Jacobi 1609. In the Kings Bench.

### Barwick and Fosters Case.

*Reservation of Rent, Michaelmasse, or ten dayes after.*

A Man made a Lease for two years at *Michaelmas*, rendring two shillings yearly during the Tearn, at the Feast of the annunciation of our Lady, and *Michaelmas* or ten dayes after, at the Feast of Saint Michael in the last year the Rent is not paid; the question was what remedy the Lessor hath for his Rent of this halfe yeare, and the opinion of *Flemming cheife Justice*, and *Williams* was, that he hath no remedy.

And first they sayd, as this case is, the Lessee hath election to pay either upon the Feast or upon the tenth day after, and that is for the benefit of the Lessee, then he hath made his Election not to pay that at the Feast.

Feast of Saint Michael, then it is cleer that the Lessor hath no remedy by way of distress, for the Term is ended before; and by Action of Debt upon the Contract, he hath no remedy as it seems, as this case is, for the Contract is that the Rent shall be paid yearly during the Term, then when the Term is ended, the contract is determined, and for that the cheife Justice sayd, That if a man makes a Lease at Michaelmas for a yeare, rendring Rent yearely at our Lady day, and the ninth of October which is after Michaelmas, that the Lessor hath not any remedy for the Rent of the last halfe yeare, for that is not reserved to be payd yearly, according to the contract: And Telverton Justice agreed that the Lessee hath election as above, but he saith, when that is behinde the tenth day after Michaelmas, then the Lessor shall bring his Action of Debt, and declare that the Rent was behinde at the Feast of Saint Michael, and shall not make mention of the ten dayes after; and Coke Justice sayd, That it seems to him that the Lessee shall not have the benefit of these ten dayes after the last Feast, for the words of the Lease are (rendring Rent yearly) during the tearme at the Feasts aforesayd, or ten dayes after; so that the Lessee shall have the benefit of these ten dayes during the tearme, but not after, then he shall not have these after the last Feast of Saint Michael, for then shall the tearme be ended: And after in Trinity Terme, 8 Jacobi, The Case was moved againe; and then Flemming cheife Justice conceived, That the Lessee shall not have ten dayes after the last Feast, and this upon construction to be made reasonably, for otherwise the Term being ended, the Contract should be determined with the Term, and so the Lessor should be without remedy for his Rent, and he sayd, that reservations are not taken so strictly, according to the letter.

And for that he cited the case of Hill and Granger in the Com. fol. 171. Where a man makes a Lease for a year: And the Lease was made in August, rendring Rent yearely at the Annunciation of our Lady and Michaelmasse, upon condition of Re-entry: In this case the first payment shall be at the next Michaelmasse after the making of the Lease, and not at the Annunciation of our Lady, though this is first in words, and this by reasonable construction, for otherwise this word (Yearely) shall not be supplied, and of this see the Action, and so he said in this case, Rent is reserved yearely during the Term, at the Feasts of the Annunciation of our Lady or Michaelmasse or ten daies after, he shall not have ten daies after the last Feast: But Williams held his old opinion that the Lessor hath no remedy for the last halfe years Rent, and it was adjourned.

Hillary 7. Jacobi, in the Kings Bench.

Grymes against Peacocke.

Grant of Common extinct.

Exposition of Usage.

**I**N Terſpaffe for his Cloſe broken, The Defendant juſtifies, that it was uſed within the Mannor of D. that every Farmer of ſuch a houſe (and averred, that that had been allwaies let to Farme,) had Common in the Lords waſt: The houſe came into the hands of the Lord in Poſſeſſion: And he granted the houſe and the waſt to J. S. in Fee, J. S. Bargaines and Sells the houſe to J. N. with all Commons, Profits, and Commodities, uſed, occupied, and pertaining to the ſame: And after grants the waſt to another: If the Grantee of the houſe ſhall have Common in the waſt was the queſtion: And Yelverton argued that the Common was gone, for if he ſhall have Common, this ſhall enure as a new Grant of a Common, but this cannot ſo enure for two reaſons.

Fiſt, when a man will grant a Common, he ought to ſhew the place in certaine where the Grantee ſhall have this Common, or otherwiſe the Grant is void; But here no place is ſhewed, and for that it cannot enure as a new Grant of a Common.

Secondly, If that be a new Grant, yet this hath reference to the uſage, that is, *Quod Uſitatum eſt, &c.* And this *Uſitatum* is void, for it ſeemes to him that Leſſee for yeares cannot alledge a uſage, for every (*Uſitatum*) ought to go in one ſelfe ſame currant, not interrupted as in the caſe of a Coppy-hold: But here every new Leaſe, is a new contract, and ſo the uſage is interrupted, and then the Grant having the reference to the uſage, and that is void uſage, nothing ſhall paſſe by this Grant, and for that in *Long, 5. Ed 4. 40.* If a cuſtome be againſt Law: And that is confirmed by the Act of Parliament, this is void confirmation, for it hath reference to a void cuſtome, ſo here this Grant hath reference to the uſage, and for that it ſeemes to him that the Common is gone.

Hutton Serjeant to the contrary, and that the Grantee of the Meſſuage, ſhall have common, for this uſage is not a thing by ſtriſtneſſe in Law appertaining to the Land, but this hath gained his reputation, that that ſhall paſſe very well in a conveyance by apt words: And for that it will not be denied, but if a man makes a Leaſe for yeares to one, and grants him Common for all his Kine, &c. And after this Leaſe expires, and he makes a new Leaſe, and grants ſuch Commons as the fiſt Leſſee had, that this ſhall be a good grant of Common to the Leſſee: So he ſaid in this caſe, this grant of the houſe with all profits and commodities uſed, occupied, and



and appertaining to the said Messuage, shall be said a grant of such Common, which other Lessees of this Mannor have used, and this by reasonable construction in Law, to make good the conveyances of Lay-men, according to the common speaking, for *Benigne sunt Faciende Interpretationes Chartarum, &c.* and for that he cited the case of Hill and Grange in the Comment: Where the case was: That a man made a Lease for yeares of a house and a hundred Acres of Land appertaining to that, though the Land be not appurtenant to the house, yet insomuch that this hath been usually occupied with the house, this shall passe as appertaining to it, and so 26. Affis. 38. A man makes a Lease for life rendring Rent, and after grants over the Rent to 7. S. and dies: The Heire grants and confirms to the Grantee and his Heires, the same Rent with clause of distresse, and the Tenant for life dies, now is the Rent reserved upon the Estate for life determined, and yet this shall enure as a new grant of another Rent in quantity: So in Sir Moyle Finches Case, the case of uses, and Durham in Ejectione Firme: A Lease was pleaded of a Mannor, whereof the feilds in which, &c. Were parcell: And Issue was joyned, *Quod non Demiset Manerium*: And upon this Issue found it was, that there were not any Freeholders, but diverse Copy-holders, and this was allwaies knowne by the name of a Mannor, and it was adjudged that this shall passe for him which pleads the demise of the Mannor: Then if in Judiciall proceeding the Law makes such favourable construction to make that passe by a Mannor which is no Mannor in truth, because it hath been usually known by the name of a Mannor, then it seemes to him, a *Fortiore*, that no more beneficiall construction shall be made in conveyances, which allwaies shall be construed to the intent and meaning of the parties, and so it seemes to him that the Common remaines, and Crooke, Tolverton, and the cheife Justice Flemming conceived that in reason he shall have the Common, but they did not give any absolute opinion as to that: But Williams Justice to the contrary, and that the Lessee for yeares cannot have more, then he contracted for in his Lease, and then the *Ustatum* void, and the Lessees have taken that by wrong: And this Grant having reference to a void and wrongfull usage, is not good, and it is adjourned.

Hillary 7. Jacobi 1609. In the Kings Bench.

Stydson against Glasse.

Stydson brought an Ejectione Firme against Glasse: and upon speciall Verdict the case was this: that is, That one Holbeame was *Ejectione firme.*  
seised.

*seised of the Land in question in Fee, and made a Lease for life to Margret Glasfe, and after covenanted with John Glasfe Husband of the said Wife Lessee, that before such a day he would Levie a Fine to A. B. and to the Heires of A. of the same Lands, which Fine should be to the use of the said Glasfe for sixty yeares, to begin after the death of the said Margeret Glasfe, with Proviso within the same Indentures, that if the said Holbeame at a certaine day should pay to the said John Glasfe a hundred pounds, that then the Lease should cease, and then of that the Conusees should stand seised to the use of the said John for his naturall life, and after the said Holbeame disseised the said Margeret Glasfe the Lessee, and made a Feoffment to the use of himselfe and one Alice, with whom he intended to marry, and to the Heire of their two bodyes begotten, the remainder to the right Heires of the Feoffor, and after the sayd Feoffor and Alice intermarried, and after the said Holbeame tendred a hundred pound to the sayd John Glasfe the Lessee for years, and after the sayd John Glasfe assigned over his Tearme, and after the sayd Holbeame by Deed indented and inrolled, bargained and sold the said Land to the said John Glasfe and his Heir, and after John Glasfe dyed, and the Inheritance descended to the said Margeret Glasfe Lessee for life, the Conusor dies, his Wife enters, and lets to the Plaintiff, the Defendant enters upon him, and the Plaintiff re-enters and brings Trespass against the Defendant, which justifies as servant to the Assignees of the Tearme, and if upon all the matter, &c. And it was argued by Nicholls Serjeant for the Plaintiff, and he moved three points in the case.*

First if by this feoffment upon such condition as this is, had been Extinct at the Common Law, or remaines to the Feoffor notwithstanding the feoffment, for if he have interest in the Land, then it is extinct by the Livery, for it is given of the Feoffor and past out of him, and yet the Feoffee cannot have, and for that it is extinct, but if it were but Authority, as in 15 H. 7. Authority to sell the land of the Devisor, then the Authority remaines, and is not extinct by the Feoffment of the land, so power of Revocation to a stranger which is but authority is not extinct by a feoffment: *Albaines case Coke 112. a.* But if it be right in Interest, then it is extinct by the feoffment, as power of revocation to the Party himself, resolved to the point in *Albains case*, so of Title to a Writ of Deceit, 38 Ed. 3.

So of a title to be Tenant by the Curtesie, 9 H 7. 1. But by 42 Edm. 3. by a Feoffment made by a Parson of Land of his Rectory, the Tythes of that Land are not extinct, but remaines notwithstanding the Feoffment, for that it was collateral to the title of the Land, as the Cases of Authority are, which were put before; then if this power to alter a Lease by payment of a hundred pound be  
not

not any right nor Interest, but a collateral power, and the authority not extinct by the Feoffment, but remains; but admitting that it is in nature of an ordinary Condition, and that before the *Statute* it should be extinct by the Feoffment, for that it is the gift of the Feoffor, and yet it is not transferable to the Feoffee: If now by the *Statute* of 32 H. 8. which inables Grantees of reversions to take advantage of Conditions, if the condition be not transferred to the Feoffees, and so over, to he to whose use, that then by consequence this remains to the Feoffor, which was the he to whose use, and then the tender of the money after, well may alter the Lease; it seems that so, for before the *Statute* if a Lease for yeares had been made upon condition to cease, and after the Lessor enters upon the Lessee and makes a Feoffment, and the Lessee re-enter, and breaks the condition, the Feoffee shall take advantage of that condition, being by way of ceasing of an Estate; so after the *Statute*, the Feoffee of the Lessor shall take advantage of the condition of Re-entry, and of every other condition annexed to the reversion, as well as of one condition to cease, before the *Statute*, and as well that every Grantee shall doe since the *Statute*, for though that he comes in by Feoffment, which is wrong to the Lessee, yet after the re-entry, the Lessee is in nature of a Grantee: And he cyted the Case of *Clifford Error*, 7. Ed. 6. to be, that Lessor entred upon his Lessee and made a Feoffment, if the Lessee re-enter, the Rent and the Condition are revived againe and the Feoffee shall have both, see *Cliffords Error*, 7. Ed. 6. *Dyer* the last case, and 1. *M. Dyer* 96. 43. but there is not any such matter, and for that it seemes that he hath another report of this case of *Cliffords Error*, or otherwise he meant some other case and not *Cliffords Error*, so is our case the condition being inherent to the reversion shall passe with the reversion, be that by grant or feoffment, and when the reversion is revived by the entry of the Lessee, the condition shall be revived also, and it is the more strong, insomuch that the Condition is, that upon the payment of the money the Lease for yeares shall cease, and not that the Lessor shall re-enter, that such Feoffee shall take advantage of a condition by way of ceasing of that at the Common Law: 2. point, and for the second point he would not argue against that, that he took to be cleer, and for that he conceived the Law to be against his Clyent in this point, though that after the Disseisin and Feoffment the free-hold could not accrue.

Thirdly, The third point was, that after the disseisin of the Tenant for life, he that had future Interest of a Tearme to begin after the death of the Lessee for life (during the disseisin) assigns over all his Interest, if this assignement be good or not, and he argued that not, for by him the disseisin of the Tenant for life, the

future Interest to commence after the death of the Tenant for life, is converted into a Right, and Right of a Tearme cannot be transferred over, for though that Lessee for years to begin presently, may grant over his Interest before his Entry, and it is well for that, that it is an Interest forthwith, yet if before his Entry the Lessor be disseised by a stranger, yet by him now, he cannot grant his Interest over for that, it is converted into a Right of a Tearme, but he ought to re-enter before that the Lessee may grant over his Tearme, so in our case, though that before the disseisin of the Lessee for life the future Interest was transferrable over, for that, that it was Interest, though that it was not a Lease in possession, yet when the Tenant for life was disseised then his Interest of a Tearme was turned into a Right of a Tearme, and then it is not transferable over till the re-entry by the Lessee for life, and he said that it was resolved by the 2. chief Justices in the Star-chamber as he hath heard, that if Lessee for years be, and before his entry a stranger enters, and disseises the Lessor, that now the Lessee cannot grant his Tearme before that the Lessor hath entred, or he himselfe hath gained the Tearme in possession: And so it seemes to him, that the future Tearme doth not passe by this assignement, and then it is extinguished by the purchase which commeth after, and then the Justification of the Defendant as Servant to the Assignees not good: And so upon all the matter he praied Judgement for the Plaintiff.

*Williams* Justice said, that it was cleer, if a man have a Lease for years, to begin after the death of a Lessee for life, as is the case at the Barr, that though that the Lessee for life be disseised, yet the Interest remaines good Interest to the Lessee, and is not turned into a Right of a Tearme, and for that he may grant it over, notwithstanding the disseisin, and so is *Sapphins* case 5. *Coke* 104. Otherwise if the Lessee for years had been any time in possession by force of his Lease, and it is Adjourned.

At another day the same Tearme the case was argued againe by *Yelverton* of *Graves Inn* of the other part, that is for the Defendant, and first he said that the Plaintiff which claimes under the Wife, of *Hlobeame* hath not any right to one *Moytie* cleerely, for the Husband and the Wife were Joynt-Tenants before the coverture: So that they take by *Moyties* and not by Intirities, and when the Husband bargaines and sells all, that is a seperation of the Joynttenancy, and his *Moytie* is gone for ever, as it appears by 3. *M. Dyer* 149. 82. So that for one *moytie* it is cleer, that the Plaintiff hath not any right any way, how ever the case prove, for the other *Moytie*, and this *Moytie* which was conveyed by the Husband is descended to the Defendant, which hath no speciall  
outer

outer found by the Verdict: But only that he entered which he well might, having the other halfe, and then no Trespasse found by the Jury, and also the Damages found by the Jury are Intire, and then being no cause of Damages for part, there shall be no Judgement for the residue: And the first point that he moved was, if after this disseisin and feoffment over, the Feoffor might tender the money to cease the first Estate, and it seemes that not, for the Free-hold cannot accrue, as it seemes to him by any tender after his disseisin, and so it hath been agreed to him as he said by the Councell of the other part, and then by him this condition consisting of two parts, this is Disseisin of one Estate and Accruing of the other Estate, if by this disseisin the condition be destroyed, for the accruing of the Estate, it seemes also that it shall be destroyed as to the ceasing of the first Estate; for if a condition be destroyed in part it shall be destroyed in all, for it is Intire and cannot be apportioned, and by consequence if one Estate cannot accrue, the other shall not cease: And he resembled it to the case in the 14. H. 8. 17. And Perkins, condition being in the Coppulative one part being dispenced with the other, was a discharge, so when a man hath election to do one of two things, if one be discharged (though that it be by the Act of God) as by death, &c. Yet the other shall be discharged by the Law, as it was in *Langtons Case* 5. Coke 22. a *Fortiare* when one is discharged by the Act of the party, also by him if he had made any Feoffment after this disseisin, yet the very disseisin would destroy the accruing of the Estate, for though that he do not gaine Fee by the disseisin but only Estate for life, and retains his old reversion in him, according to 9. H. 7. 25. Yet the Fee and the Free-hold are so conjoynd by discent of that Estate alters an entry, as it appeares by 3. Ed. 3. Entry Congeable 58. And if he in reversion disseise Tenant for life, the Contingent uses shall never rise, by *Chidleys Case* first of Coke 158. Condition that he retain his old remainder, no more of the accruing of the Fee in our Case, for by him it appeares by 10. Affs. and *Nicholls Case Com.* That Estate ought to accrue upon possession, or at least upon an Estate in being, and not upon a right of an Estate only: And for that he cited 6. R. 2. *Pleasingtons Case*, Lease for years upon condition, that if the Lessee be outed he shall have Fee, though that he be outed yet he shall not have Fee, for that, that at the time of the condition performed he had but a right of Tearme, and no Tearme in possession, so is our case after the disseisin, he having but right the Estate cannot accrue.

Secondly if the Grantee, or he to whose use, may performe the Condition, either by the Common Law, or by *Statute Law*: And he conceived that none of these might performe that, for first at



the common Law, though that Grantees of reversions may take advantage of a Condition by way of cesser of Estates, upon the condition performed, yet this is only when the condition was to be performed of the part of the Lessee, and so was the case cited by Serjeant *Nicholls* of 11 H. 7; but if the condition were of the part of the Lessor, otherwise it was, as the Book is in 26 H. 6. Entries. And then a *Fortiori* here, the Assignee of a Disseisor cannot perform the condition, which may be performed of the part of the Lessor.

But he agreed the case of *Littleton*, that an Assignee of an Estate may perform a condition in preservation of an Estate, otherwise of an Assignee of a Reversion, in destruction of an Estate, so at the Common Law it is clear, that the Feoffee cannot perform the condition, and by him it is clearly out of the *Statute of 32 H. 8.* for this *Statute* doth not extend to a collaterall condition, as it appears by *Spencers case* 5. *Coke*, and so hath been many times after this adjudged, and this is a collaterall condition, *Ergo*, &c. And so concluded, and prayed Judgment for the Defendant.

*Nicholls* Serjeant to the contrary, and that this Disseisin hath not suspended the condition, but that he may pay the Money, and make the Estate to cease notwithstanding the Disseisin, for that, that the condition is collaterall, like to the 20 of *Ed. 4.* and 20 *H. 7.* That where a Feoffee upon a collaterall condition takes back an Estate for years, yet this shall not suspend the condition, but it may be performed or broken, notwithstanding the Lease, for that that it is collaterall, so in our case, for suppose that the condition had been if he marry *Mistress Holbeam*, that then his Estate shall cease, and as well it shall be upon the Tender of the Money here, and he said that this case was late in the Common Bench. This feoffment was made to the use of the Feoffor for life, Remainder to another for life, the Remainder to the third in tayl, the Remainder to the right Heirs of the Feoffor in fee, with power of Revocation, and after the Feoffor lets for years, and during the Term he revokes the mesne Remainders, and it seems to the Justices that well he may, for that that the Lease for years goes only out of the Estate for life, as he sayd, and for that the power of Revocation as to the Mesne Remainders was not suspended, *Quere* of the truth of this case in the common Bench; for perchance it is not truly collected, but so entred, and so he prayed Judgment for the Plaintiff.

*Flemming* cheife Justice sayd, that the point of the principall case would be, if by the wrong of the Lessor the Estate of the Lessee shall be prevented to accrue, then he might perform the condition to determine the ancient Estate, that is, the Lease for years, and it is adjourned.

*Pasch. 8. Jacobi 1610. In the Kings Bench.*

*Earle of Shrewsbury against the Earle of Rutland.*

**I**N a Writ of Errour, the Earle of *Rutland* brought an Assise of *Errour*,  
Novel Disseisin against the Earle of *Shrewsbury* and four others,  
and the Plaint was of the office of the keeping of the Park of *Clep-  
son*, and of the vailes and fees of the sayd Parke, and of the Her-  
bage and Paunage of the same, and the Demandant made his title,  
and alledged that the *Queen Eliz.* was seised of *Clepsam* Park in fee  
in right of her Crown, and that she being so seised by her Letters  
Patents under the great Seal, granted unto one *Markham* the keep-  
ing of the Park of *Clepson*, with the vailes and fees; and the Her-  
bage and Paunage of the same Park for his life, after the *Queen  
Eliz.* reciting the Grant made to *Markham*, and that *Markham*  
was alive, gave and granted by her Letters Patents, to the Earle of  
*Rutland* the Office of the keeping of the sayd *Clepson* Parke,  
with the Fees and Wages to that appertaining, to have and  
to hold to him for his life, after the death of *Markham* or after  
the surrender, or forfeiture of his Letters Patents, and further  
granted the Herbage and Paunage to the sayd Earle of *Rutland* for  
his life, and doth not say when this shall begin, after which the  
*Queen Eliz.* died, and the Bee-simple descended to our Lord the  
King, which now is as lawfull Heir to the Crown of *England*,  
which granted that to the Earle of *Shrewsbury*, after which *Mark-  
ham* dyed, and the Earle of *Rutland* entered, and was seised till the  
Earle of *Shewsbury* with four others entered upon him, and dissei-  
sed him, and to that the Tenants alledged no wrong no disseisin,  
and when the Assise was to be taken in the Country, the Array was  
challenged by the Tenants, for that that one of the Tenants in the  
Assise, had an Action of Trespasse hanging against the Sheriff, and  
this challenge was not allowed, and the Assise being perused at  
large for the Herbage and Paunage, they found, that the said *Queen  
Eliz.* was seised of *Clepson* Park as aforesaid, and by her Letters  
Patents as afore is rehearsed, granted the Keeping of this to *Mark-  
ham* for his life, and further by the same Letters Patents granted  
to him the Fees and Wages to that belonging, and further granted  
by Letters Patents, and doth not say (*Eadem*) to him, the Her-  
bage and Paunage of the sayd Park, and that the *Queen* after the  
reciting the Grant made to *Markham*, and that *Markham* was  
alive, granted to the Earle of *Rutland* the keeping of the sayd Park  
and vailes and fees, to have and to hold after the death, surrender,  
or forfeiture of the Letters Patents of *Markham* for his life. And  
further

further by the sayd Letters Patents, shew granted the Herbage and Paunage of the same Park to him for his life, as more fully appears by the Letters Patents, and it was not exprest, as to the Herbage and Paunage when that began, and they found the death of *Markham*, and that the Earle of *Rutland* put two Horses into the sayd Park to take seisin of the sayd Herbage and Paunage, and they found further the grant of the King to the Earle of *Shrewsbury* of the fee-simple, and of that prayed the advise of the Court, and to the keeping of the Park they found the seisin and disseisin of that, and of the fees and wages to the Damages, &c. And this being adjourned into the Common Bench, was remanded into the Country, and there Judgment was given for all for the Demandant, and after this it came into the Kings Bench by Writ of error, and the Errors assigned by the councell of the Tenants, and argued at the Barr were foure.

The first was that the Earle of *Rutland* himself, between the verdict and the Judgment hunted in the Park and kild a Buck, and took a shoulder of that for his fee, and so he hath abated his Assise, and so the Judgment was given upon a Writ abated, and therefore they cannot plead that in abatement, insomuch that it was mesne betwixt the Judgment and the verdict, they assigned that for error.

The second was, because the principall challenge was not allowed, where that ought to have been allowed, and the challenge was, that one of the Tenants had an Action or Trespasse hanging against the Sheriff before the Assise.

The third was, Because the Jury have found the Letters Patents made to *Markham*, and that the Queen granted to him by her Letters Patents the custody of the Parke of *Clepson in Clepson*. And further by the same Letters Patents granted the vailes and fees, &c. And further granted the Herbage and Paunage, and have not found that this was granted by the same Letters Patents, and then if this be not granted by the same Letters Patents, then there is not any grant of this to the Earle of *Rutland*, because there is no receiptall of the Patent by which the Herbage and Paunage was granted to *Markham*.

The fourth error was, that they have erred in point of Law, and to that the point is but this, the King grants the Herbage and Paunage of a Park to one for life, and after reciting that grant, and that the Patentee is alive, grants that to another, and doth not say when that shall begin, and it seems to them that the Argument for the Plaintiffs in the Writ of error, that this was a voyd grant, and so the Judgment erroneous, but I have not the Report

Report of the Arguments of the Conncellors at the Barr, but only of the Judges, which moved two other errors in the case, not moved by the counsell at the Barr, and *Crooke* Justice rehearsed the case as before.

And to the first error he conceived that this is no error, and that for two reasons,

First, He tooke a difference betweene a thing which abates the Writ by Plea, as if a man brings an Affise against another, and mesne between verdict and Judgment, the Plaintiff dies, this matter shall abate the Writ without Plea, and for that if Judgment be given upon such verdict, the Judgment is erroneous, but in our case an entry doth not abate the Writ without pleading that, and now as this case is, this cannot be pleaded, being between Verdict and Judgment, and for that it shall not be assigned for Error, see 19 *Affise* 8, Where this difference is taken, and agreed.

*Abatement of a writ by entry.*

Secondly, Admit that this entry might have abated the Writ in *Falso* without Plea, yet there is no such entry alledged, which might abate the Writ in *Falso* without Plea, for the entry is alledged that the Earl of *Rutland* entred to hunt, and kild a Buck, and took a shoulder of that for his fee, and it seems that this is no such entry that shall abate the writ, for he hath now entred to another purpose to hunt, the which he could not do, but the entry ought to have been alledged that he entred to keep, for in every entry the intent of the Entry is to be regarded, and to this purpose he cited the case of Affise of *Freshforce*, *Com.* 92. and 93. Where entering into the Seller hanging the Affise of that, to see the Antiquity of the House, there was no Entry to abate the Writ and the case of 26 *Affise* 42. where the Disseisee, hanging the Affise comes and sets his foot upon the Land, but takes no profits, and adjudged that he should recover notwithstanding, so in this case the intent is not shewed, that is, that he entred to keep possession but to hunt, nor was it such entry which should abate the writ, and to that which is sayd that he kild a Buck, and took the shoulder of that for his fee, this doth not help, for if that had been a Buck which he might to have kild by vertue of his Office, he ought to have shewed his warrant, for otherwise a Parker cannot kill a Buck if not that it be for his fee, and then he shall have the Buck, and not a shoulder only, also it is alledged that he took a shoulder, and doth not say the best shoulder or the right shoulder, and this ought to be shewed in certain.

And so for he first Error he conceived that this is no cause to reverse the Judgment, and to the challenge he sayd, that he would speake to that at the last, and for that he now spake to the errors supposed in the grant.

And

Markhams  
Grant.

And first to *Markhams* Grant, where the Jury found the Queen *Eliz.* granted to him the keeping of the Park, and by the same Letters Patents grant the fees and Wages, and further granted by her Letters Patents, and doth not say (*Easdem*) the Herbage and Pannage, it seems to him that this is very well, for two reasons.

First, inasmuch that there is a copulative, which is this word (*Et*) and also a Relative, which is this word (*Uterius*) and this word conjoynes the matter precedent with the subsequent, and the word (*Uterius*) hath necessary relation to the same Letters Patents, and so *Ex precedentibus & subsequentibus*, the Jury hath well found the matter.

Earle of Rut-  
lands Patent.

Secondly, these words are supplied in the second Patent, for there the Jury have found that the Queene hath granted that to *Markham* by the same Letters Patents, and so for these two reasons he concluded that this is no Error to reverse the Judgement: And to the Patent made to the Earle of Rutland, it seems to him also, that this is very good, and all that he said in effect was, that in construction of the Patents of the King, such exposition is to be made, that if any reasonable meaning may be conceived, they shall not be defeated but shall stand good: And so he said in our case, that it is necessarily intended that this was also to begin after the Estate of *Markham* determined, and for that good: And he said that a man ought not to make a curious and captious interpretation of the Kings Patents, for *Talis Interpretatio in jure Reprobatur*: And to the challenge, that seemed unto him a principall challenge, and this not being allowed, where it ought to be allowed, this is an error, as it is said 8. of *Affises* 23. and for this error it seems to him that the Judgement shall be reversed, and to that he said he relied much upon the book of 11 *H.* 4. 25. which takes a difference between Debt and Trespasse for battery, for the booke saith that a man may demand his Debt, without giving occasion of any malice: But Battery is an evill Action, and there the book is resolved, that it shall be a principall challenge, and so he saith in Trespasse, this being with force and Armes, that, &c. And in 8. *H.* 5. in a *Affise*, the Tenant challenges the array, because he had an Action of Trespasse hanging against the Sheriff: And there the array was affirmed because it appears that the Defendant had brought this Action by Covin against the Sheriff, which case proves, as he said, that if there be not any Covin this is a principall challenge, and 38 *H.* 6. 7. accordingly, and the case 28. *Affise* 11. where the Defendant in *Affise* challenged a Juror, because he had an Action of Trespasse hanging against him, and was outed by award, and in 21. *Ed.* 4. 12. it is said where there is an apparent favour, or apparent displeasure, there shall be principall challenge, and certainly though the

Challenge.



the Law may intend, that a man may lawfully demand his right; and without malice, yet it appeares that the nature of men is perverse and froward, and few Actions are begun without apparent displeasure, especially Actions of Trespasse, *Pedibus Ambulando*, and vexation plainly appeares, when Actions are begun upon such slight occasions, and in Actions of Trespasse there issueth a *Capias* for a Fine, and so the Defendant shall be Fined and Imprisoned, and sure to be deprived of his liberty is a thing distastefull.

And it cannot be but that displeasure shall be between them, which endeavour to restraine one the other of their liberty; and so he concluded that this was a principall challenge, and not being allowed this is error, and so for this cause he reversed the Judgement: Also it seemed to him as this case is, there is no seisin found of the Paunage, for the Jury have found that the Earle of *Rutland* hath put in two Horses, and it seemes to him that Horses cannot take seisin of Paunage, which is properly meate for Hoggs, and so for this reason also, infomuch that there is no seisin found of the Paunage, and the Jury ought to find of necessity a Seisin and Desseisin, it seemes to him that this is error, and so the Judgement ought to be reversed, and at the same day *Williams* Justice rehearsed the case as before, and in his argument he spake.

First, to Grants. Secondly to the challenge.

Thirdly to the abatement of the Writ; And it seemes to him, that none of these matters were sufficient to reverse the Judgement, but yet he conceived for two other causes that the Judgement shall be reversed.

And first concerning *Markhams* Patent, that the Jury have found very good, though that they have not said by the same *Letters Patents*, but he said that it had been more proper if they had found that the King had granted that by the same *Letters Patents*, and for that he cited the case of Information of Mines in the *Com.* And the pleadings before the case, there the *Letters Patents* of the King are pleaded, and where the King grants divers things, it is there said, that the King by the same *Letters Patents* granted, and so the case of *Grendon* against the Bishop of *Lincolne*, where the King by his *Letters Patents*, granted to a Deane and Chapter that they should hold an Advowson to their proper use, and further granted by the same *Letters Patents*, &c. And so he said in this case that this had been more properly found; if it had been found that the King (*Per Eisdem Litteras Patentes*) granted, yet this is very good as it is, and this as he said by the Intendment, for it cannot be otherwise intended, and for that he cited the book of Entries in Title Covenant: That where a man brings a Writ of covenant, and counts upon an Indenture, that is, that the Defen-

Earl of Rut-  
lands Patent.

dant covenanted to do such a thing, and further covenanted, and doth not say by the same Indenture, yet this is very good because it cannot be otherwise intended, but when that is by the same Indenture, and where things shall be taken by Intendment, he cited the case of 5. *Affis*. 2. Where in Affise of Common, the Plaintiff made him Title, that is, that he was seised after the Coronation of King *H.* this shall be intended *H.* 3. See *Brooke* Limitation 4. and the Case of 17. *Eliz. Dyer* 342. Where these Letters *H. R. A. F.* shall be intended *Henricus Rex Anglie Francie. &c.* And he cited the case of 21. *H.* 7. 32. Where a man pleads a release made in *Villa de West.* the County of *Middlesex*, and doth not say secondarily, *In Predicta Villa*: And there these Justices held that good, and it shall be intended the same Town, so he said in this case, this shall be intended that Grant by the same *Letters Patents* (though that (*Easdem*) be left out: And to the Grant to the Earle of *Rutland*, he held that good, also though that it is not expressed as concerning the Herbage and Paunage when that should begin, and he said that this is also for the intent, and also he said that this is not in prejudice of the King, nor in deceit of the King, nor to the double Intendment, and for that good: And he put the case where the King made a Lease for one and twenty years rendring Rent, and doth not shew when that shall begin: That shall begin from the Date of the *Letters Patents*, because it cannot be otherwise intended, so in the principall case the grant of the Herbage and Paunage depends upon another Grant: That is, the custody of the Parke which was to begin after death, surrender, or *&c.* of *Markham*, and having relation to that by this word (*Ultrius*) that shall be necessarily intended to begin at the same time, and he well agreed the bookes of 3. *H.* 7. fol. the last; and 6. *H.* 7. 14. 8. *H.* 7. 1. 9. *Eliz.* 259. 7. *Ed.* 6. *Dyer* 80. That there is no reversion of an office: But yet the King may grant an office after the first Grant determined, and this shall be good: And so shall be in our case of the Herbage and Paunage, and he cited the case of 8. *H.* 7. 12. 13. where the King was Founder of an Abbey, and he had granted a Corody to another for life, and after he released that, and granted it to the Abbot, this shall not be a good release presently, because another hath the possession for present of it, but this shall be good after the death of him which hath this granted for his life: And he cited the case of the Lord *Chaundois* 6. *Coke*, where the King grants the Mannor of Dale in tayl, and after grants the Mannor to another, this shall passe the reversion, for this is all that the King can passe: So he said in this case, this shall passe in such manner as it may passe, by which he concluded the Grant to the Earle of *Rutland* good: Also to the challenge, it seemed to him it is no principall challenge,

and

Challenge.

and for authority he cited the case in 11. H. 4. That hath been cited of the other part, which was for him as he said, for this takes the difference between Debt and Battery, and 38. H. 6. a. Juror was challenged because one of the parties had an Action of Trespasse hanging against him, and this was not any principall challenge, unless it be Trespasse of Battery, and to the booke of 20. *Affis*. 11. Where a Juror was challenged, because he had Trespasse against him before the *Affis*. he said it did not appeare by the book; what Trespasse that was: So it shall be intended Battery, and he concluded with this difference, that if such an Action be hanging which tends to the utter undoing of him, against whom it is brought, then if the Defendant in such Action make the array, this shall be a principall challenge, but if it be but such an Action in which a man shall recover but his Debt or Damages or such lawfull duties; there to say that such Action is hanging between them, at the time of the array made shall be no principall challenge: And for that he cited the booke of 24. Ed. 3. Where a *Tales* was returned by the Sheriff of *Middlesex*, and the party challenged the Jury, because he sued the Sheriff for the death of his Servant, and this was a principall challenge, for in such case his life was in question; the same Law in case of Maintenance and Champerty, for the Law hath inflicted great punishment upon such Offences, so these matters tend to utter subversion of his Estate and life, but otherwise in Actions of Trespasse, and so he concluded no principall challenge: To the abatement of the Writ it seemes no Error.

Abatement.

First he conceived that there is no entry, and for the reason that *Crooke* had given before, that is, because he entred to hunt, and not to keep possession, and hath not shewed any Warrant to kill the Buck, and he cited the booke of the 5. of Ed. 4. fol. 60. Where *Babington* brought an *Affise* of the house of the *Fleete*, and hanging the *Affise*, *Babington* came to the Jury within the house (when they had the View) with his Councell to shew Evidence for the view, and this was not any entry to abate the Writ, and so the entry to hunt is an entry for another purpose then an entry to keep possession (not being by warrant as it is not found) and for that no entry to abate the Writ: But admitting that this had been an entry to abate the Writ, yet being a thing which doth not abate the Writ without Plea, and that cannot be pleaded as the case is, he conceived was no Error, but if it had been a thing which abated the Writ *in Facto* without Plea, then to give Judgement upon a Writ abated is Error: As if the party die hanging the Writ, or if a woman sole brings an *Affise*, and takes a Husband hanging the *Affise*, or if the Plaintiff in a *Affise* be made Judge of *Affise*, as the 15. of *Affise*, in all these cases the Writ is abated *in Facto* without Plea:

Error?

But entry shall not abate the Writ without Plea, and so it seemes to him no error : But he conceived that there were two other errors, for which he reversed the Judgement.

Variance.

The first was, that this *Affise* was *de Libero Tenemento in Clepsom*, and the plaint was of the keeping of the Park of *Clepsom* and of the Herbage and Paunage of the Parke aforesaid called *Clepsom*, and made his Title for Herbage and Paunage of the Park of *Clepsom*, and so he conceived that there is variance between the Plaint and the Title and Park of *Clepsom*; and *Clepsom* cannot be intended one, without speciall averment, and for that he conceived it to be error. And to that he cited the case of twelve *Affises* two. Where in attaint the first originall was of the Mannor of *Austy*, and the Attaine was of the Mannor of *Auesty*, and yet for that that the Attaint is founded upon the Record, and not upon the Originall, and the Record was of the Mannor of *Auesty*, this was very good, but the Booke saith, that this variance between the Originall and the Record, was sufficient to reverse the Record for error, and the case in 42 of *Ed. 3.* Where *Scire facias* was brought of Tenements in *Eastgrave*, and the Fine was of Tenements in *Deeprave*, and for the variance the Writ abated; and in the case of 5 *Coke* 46: *Formadon* was brought of the Mannor of *Iseild*; and the Tenant pleads in barr a recovery of the Mannor of *Iseild*, and this shall not be amended unlesse it appear that this is a misprision of the Clark or by other averment, he cited also the case of 3 *H. 4.* 8. *Scire facias* upon garnishment in a Writ of *Detinue* of writings, the Originall name *John Scripstead*, and the *Scire facias* was made *John Shiplow*, and therefore agreed that he shall sue a new *Scire facias*, so he said in the Principal case the Plaint being of Herbage and Paunage of *Clepsom* Parke, and the title being at *Clepsom* Parke, these shall not be intended to be the same Parke without averment, and there in no averment in our case, and for that such variance is such error, that shall reverse the Judgement.

Seisin.

The second error for which he reversed the Judgement was that which was moved by Justice *Crook* that the Jury have not found any seisin of the Paunage, for it seemed to him that a Horse could not take Seisin of paunage, and for that he defined paunage, and he sayd that *Linwood* title Tithes saith, the *Pannagium est pastus Porcorum*, as of Nuts and Akornes of trees in the wood, and *Crompton* saith, that this is, *Pastus Porcorum*, and he saith that *Pannagium* is either used for Paunage, or the Paunage it self, and the Statute of *Charta de Foresta*, saith; that every Freeman may drive his Hogg, into our royall Wood, and shall have there Paunage, but he doth not say Horses or other Beasts, but he conceived that if the Earle of *Rutland* had right in the Park, that this had been sufficient.



sufficient seisin of Herbage and Paunage also, for Hoggs will feed upon grasse as well as upon Akornes, and he cited the Book of 37 H. 6. saith that Seisin to maintain an *Affise*, ought not to be of a contrary nature to the thing of which seisin is intended to be given, but in one case only, and that is where the Sheriff gives seisin of a Rent by a Twig or by a Clod of Earth, and this is in case of necessity, for the Sheriff cannot take the Money out of the purse of the Tenant of the Land, and deliver seisin of that, and for that he cited the case in 45 Ed. 3. Where Commoner comes to the Land where he ought to have Common, and enters into the Land, and the Lord of the Waste or the Grantor of the Common outs him, he cannot have an *Affise* of his Common upon this outing, for this was not any seisin of the Common: so it is in this case, the Horses cannot take Seisin of the Paunage, and so there is no seisin or disseisin found by the Jury, and then no *Affise*, and this being after Judgment no abridgment may be of the Plaint, and so for these last reasons he reversed the Judgment.

And at another day the case was rehearsed again and argued by *Telverton* and *Fenner* Justices, but I did not hear their Arguments, insomuch that they spake so low; but their opinions were declared by the cheife Justice, and *Telverton* affirmed the Judgment in all.

*Abridgment of  
the Plaint in  
Affise.  
Telverton.  
Fenner.*

First he held that this entry shall not abate the writ.

Secondly admit that it is abated, yet being between Verdict and Judgment shall not be assigned for error.

Thirdly, he held that no principall challenge.

*Challenge prin.*

Fourthly, he held both the grants good.

Fifthly, that *Cleppam* and *Clipsam* are all one, and not such variance that shall make Errour.

And lastly, that a Horse may well take Seisin of Paunage, and *Fenner* agreed in all, but he held that this was a principall challenge, and not being allowed this was Error, and for this cause and another exception to the Record, which was not much materiall, he reversed the Judgment.

And at another day *Flemming* cheife Justice rehearsed the case, and this argued; and to the first matter he conceived.

First, That it is no such entry that abates the Writ.

Secondly, Admitting that it were yet this cannot be assigned for Errour.

*Flemming.*

And to the first matter he took this ground, That every entry which may abate a writ ought to be in the thing demanded, and for that he sayd, if a man brings an *Affise* of Rent or common, and hanging this *Affise*, he enters into the Land, this is not any Entry, which will abate the Writ, and he sayd that the Park, and the



the keeping of the Park are two distinct things, and for that the entry into one, that is, the Park will not abate the Writ for the keeping of that, and to that which is sayd that he took a Fee, that is, a shoulder of a Buck, that doth not make any matter, for two reasons.

First, he hath not shewed a Warrant he had to kill the Buck.

Secondly the taking of the fee is no entering into the Office, but the exercising of that, but admit that this were an entry, or the thing it self, yet he sayd every entry into the thing shall not abate the Writ, and to that he sayd, that if this entry of the Earl of Rutland to hunt was no such entry that shall abate the Writ, for his office was not to hunt, and for that his entry being to another purpose, it shall not be sayd an entry to abate the Writ; and for that he cited a case, which hath been cited, as he sayd, by Justice Yelverton, that if a man have Common in the Land of 7. 8. between the Annunciation of our Lady and Michaelmas and the Commoner brought an *Affise* of his Common, and at Christmas put in his Beasts and this shall not be any entry to abate his Writ, for it cannot be intended for the same Common, which case is agreed to be good Law, and he cited the case put by Brooke in *Affise of Freshforce* before remembred Com. 93. Where hanging a Formedon, the Tenant pleads in abatement of the Writ, that the Demandant hath entred after the last continuance, and upon the evidence it appears, that many were cutting wood upon the Land, and the Demandant comes into the Land to them, and warnes them upon the perill that might ensue to them, that they should do no more then they could do by Law, and this was found no entry: Also the case of 26. *Affise* before cited by Justice Crooke, and he sayd that the Statute of *Charta de Foresta*, chapter 11. willeth, that every Arch-Bishop, Bishop, Earl, or Baron, comming to the King by his command, and passing by his Forrest, &c. Was licensed to take one Beast or two by the sight of the Keeper; &c. But case then, that the King had sent for the Earl of Rutland, and he had passed through this Park, and had killed a Buck, had this been an entry to abate this writ, *Quasi diceret non*, for this was entry to another purpose, so he sayd in the principall case the entry to hunt, and so no entry to abate the Writ, but admitting that this had been an entry, which would abate the writ, then let us see if this entry hath so abated the writ, being Mesne between the Verdict and the Judgment, it cannot be assigned for error, and to that he agreed the diversity before taken by Crooke and Williams, where the writ is abated by Plea and without plea, and he cited a Judgment in the Kings Bench, between Jackson and Parker 2 Eliz. wherein *Ejectione firme* the Plaintiff entred Mesne between Verdict and Judgment, and this was assigned for

what matter  
shall be assign-  
ed for Error  
after Judge-  
ment.

for Errour in the Exchequer Chamber, and the Judgment notwithstanding affirmed, and he sayd that if *Memorandum* had been made of it, or if a Jury had found it, and it had been prayed that that might be Recorded, yet this had not been materiall, and that that be not assigned for Errour. And to the matter moved by my Brother *Williams*, that there should be a variance between the plaint and the Title, he conceived that there is no such variance, that shall make the Judgment erroneous, and to that he examined the matter.

Variance;

First that the *Assise* was of a Free-hold in *Clepsom*, and his title is made of the parke of *Clipsom*, that that cannot be otherwise intended, but that of necessity it ought to be the same park.

For first there is but one park by all the Record.

Secondly, the plaint saith, *De parco predicto*, which hath reference to *Clepsom* park, and there is but one park put in view by all the record.

Fourthly, It shall be so taken according to the common speaking.

Fifthly, when he hath made his plaint of the custody of the park of *Clepsom*, and of the Herbage and paunage of the park aforesaid called *Clepsom*, these words (called *Clepsom*) are but Idle and Trifles, and that which is but Surplusage shall not annoy. Also he said that *J.* and *E.* are letters which do not much differ in pronounciation, and they are all one as *J* and *h* shall be pronouncied as *hi*, and he cited the Book of 4 H. 6. 26. Where in Debt, variance was taken between the writ and the Obligation, that is, *Quatuordecim pro Quatuordecim*, and this variance was not materiall, but that the writ was awarded good, and so he conceived that in this case the variance of *Clepsom* and *Clipsom* shall not be such a materiall variance, that shall make the Judgment erroneous, and to the title.

First to *Markhams* grant, that is, where the Jury have found *Quod ulterius concessit, &c.* And doth not say, *Per eundem*, he held that good without scruple, and this for the necessary relation, that this had to any thing before granted, for he sayd that this should be a strange and marvelous patent which began in such a manner, that is, *Et ulterius Rex concedit, &c.* And there was not any thing granted before. And for that he cited the case of 11 Ed. 4. 2. where Debt was brought upon an Indenture against the Abbot of *Westminster*, and the Indenture was between the Abbot of the Monastery of the blessed *Mary* of *Westminster*, and rehearsed divers Covenants, for performance of which Covenants, the Abbot of *Westminster* bound himself in twenty pound, and doth not say, that the aforesayd Abbot, and yet good, for it shall be intended, the same Abbot, for he is party to the Debt, and the case of 10 H. 7. 12.

Where

Challenge.

Where in *Assise* of Common the plaintiff makes his plaint of Common appurtenant to his Free-hold in *D.* and shews for Title, that he was seised of a Messuage, and of a Carve of Land in *D.* to which the Common is appurtenant, and that he and his Ancestors, and all those whose Estates, &c. have used Common of pasture with ten Beasts, and exception taken to the title, because he saith that he was seised, and not saith, that he is, and yet good by this word (*Fuit*) for that shall be intended that he continues seised, so he sayd that things which are necessarily to be intended, though they be not so particularly expressed, yet shall be good by Implication, and so he concluded that this is no Error, for which the Judgment shall be reversed. And to the challenge, he conceived that this is not any principall challenge, and to that he put this difference, that if a man brings an *Assise* of certain Land, and hath an Action of Trespas hanging against the Sheriff for entring into the same Land, there shall be a principall challenge to the Array, but if it be for entry into other Land not in demand, otherwise it is, and what is principall challenge, and what not, he cyted the Bookes of 3 *Ed.* 4. 12. 6 *Ed.* 4. 1. 21 *Ed.* 4. 67. 14 *H.* 7. 1. 21. *Ed.* 4. 10. And to the point in question, he cyted the Bookes before remembred by *Crooke and Williams* and no others, and for that I omit to recite them, and he agreed also that in actions which concern life, Honesty, Mayme, Battery, to say that he hath such action hanging against the Sheriff, shall be a principall challenge, but Trespas for entring into Land not, for in Trespas there is no Land to be recovered, also no damages but to the value of the Trespas.

Seisin.

And in Debt a man shall recover more then in Trespasse: And yet it is agreed that this is no principall Challenge to say, that he hath an Action of Debt hanging against the Sheriff, as the Book of 11 *H.* 4. is, which hath been remembred, and for this I conceive it no principall challenge: And to the seisin of the Paunages, if a Horse may take seisin of that, it seemes that yea, for I conceive that the taking of seisin doth not consist in the eating or not eating of that, of which the seisin is to be taken, and for that he cited, that if a man grant to me the Herbage and Paunage of his Parke, and I come into the Parke and take the Grasse and Herbs into my hands, or if I gather Akornes, this is sufficient seisin for me to have *Assise*, though that I do not eate the Grasse, nor the Akornes, and for that, let us put the case that a man hath Herbage granted to him, and he puts in his Beasts, and before that they eate the grasse, they are driven out, none will deny, but that, that shall be good seisin, for so is the Book of the 22. *Assise* 84. Where a man hath Common granted to him, and he takes the Beasts of a stranger, and puts them in, and them forthwith driye out, that shall be a good

good seisin of the Common to have *Affise*, so that he said, that the eating is not to purpose, also he said Horses will eate Akornes, as well as Cowes: And he saith that in the Country where he inhabits being a Wood-land Country, they will not suffer the Beasts to go into the Woods at a certaine time of the yeare, and this is when Crabs are ripe, for then their Beasts will eate Crabs, and set their teethes an edge, and then not being able to chew Akornes do swallow them whole, and then those Ackornes being swallowed whole, will grow in the Mawe of the Beast, and so kill them: And he saith that though that Horses be not so proper Beasts, to take seisin of Paunage as Porkes are, yet being put in for the same purpose, if they are disturbed that shall be Seisin and Disseisin, and it seemes to him that when things are granted to one, that it shall not be strange to say, that seisin of one shall be seisin of both, and for that if a man grants all his arable Land, all his Meadow, and all his Wood, Livery and Seisin in one suffices for all, but I conceive that this is in respect of the soyle which passeth, and so are all of one self same nature, and so he conceives that this is sufficient Seisin and Disseisin found to have *Affise*.

And lastly to the Title of the Earle of Rutland, he said that this was good, and to the Grants of the King he said two things are necessary in all Grants of the King, that is, a Recitall, and a certainty, and when a recitall shall be necessary and when not, and he said that in all cases, when a common person makes a Lease for years or for life, and the reversion is conveyed to the King, if the King will make Estate to another, he shall not recite this Lease, for this not being of Record, the King cannot take notice of it, and so he shall not recite: But in all cases when the King makes a Lease for life, or for years, and after will make a Grant to another, he ought to recite the first Estate, because that is of Record: And Justice *Yelverton* as I heard of those which were next unto him, put this case: That if the King grants a Lease for yeares rendring Rent, and after the King reciting the Lease grants that to another for years, or grants the reversion to another, and doth not recite the Rent which was reserved upon the first Lease, that this second Grant shall be void for the not recitall: And the cheife Justice cited one *Phillpotts* Case to be adjudged in the 2. of *Eliz.* That where the King made a Lease for one and twenty yeates, and after reciting the said Lease, grants the reversion to another, and before that the second *Letters Patents* were sealed, the first Lessee surrendered: And said that the second Grant was adjudged void, for the King intended to passe a reversion, and now he shall have a Possession, and all that which is said to be in case of Land: Now let us see how it shall be in case of office, and for that if a common



person hath an office in Fee, and grants that for life, and after grants the Fee simple to the King, and the King will grant that to another, there he ought to recite the common persons Grant, as well as if it had been his one Grant, for there is not properly a reversion of an office, as the Book cited by my Brother *Williams* sayd.

Secondly, if the office be recited in *Esse*, and be not in *Esse*, the Grant is void, as *Blanchet Case* is in the Lord *Dyer* 3. *Elizabeth* 1. 97. 47. And this sufficeth for recitall: Then for certainty of the Kings Grant, it is said in the 2. B. 3. it is said that the Grants of the King ought to be made in certaine, and for that where the King there Grants to Sir *John Spenser* that he shall not be Sheriff, this was void, for the uncertainty of the place: But if the Grant had been of such a County, or such a County, the Grant should be good: Also there ought to be certainty of Estates, as it is in 18. H. 8. Where the King gives Lands to one and his Heires Males, this is void for uncertainty of the Estate, then it is so averred in our case if there be not sufficient recitall and certainty, and to the recitall that is good without question, for she recites that she hath granted that to *Markham* for life, and *Markham* is yet alive, and so the recitall good: Then for the certainty he said, that the rule is, that if the certainty be declared by expresse words, or if the King may reduce that to a certainty, the Grant of the King shall not be defeated, and for that he cited the case of information of *Mines Comment*: But if the King grant to me all *Mines* in the Land of J. S. There I shall have all *Mines* Royall, for the Law saith, the King cannot have other *Mynes* in the Soil of a Subject but *Mines* Royall, and so there the Law supplies the Grant, so that they be *Mines* Royall, though not expressed in the Grant incertaine, so he said in the principal case, that the Queen hath expressly recited, that she hath granted the Herbage and Paunage for life to *Markham*, and that *Markham* was yet alive, and after grants that to the Earle of *Rutland*, and doth not say when that shall begin; the Law saith that shall begin after the death of *Markham*, for before that it cannot begin: But if the Queen had exprest in the *Letters Patents*, that this shall begin forthwith, then this had been void, as the Lord *Gandy* said in *Altonwoods Case*, 1 *Coke* fol. 51. And so he concluded the Title of the Earle of *Rutland* good: So he affirmed the Judgement in all: But *Williams* was very peremtory for the conceit of Paunage that it was not good Seisin: But after *Crooke* Justice recanted his opinion of that, and insomuch that there were three which concluded for the reversing of the Judgement: And yet for every point there were three against two: It was doubted if this Judgement should be reversed or not: And they said that they would advise  
with



with the rest of the Judges, and after that it was moved againe by Serjeant Nicholls in the next Trinity Tearme, and Yelverton and the cheife Justices would have the Judgement affirmed, but Williams, Fenner, and Crooke, to be reversed, and note well this President, where Judgement was reversed, and yet for every point there were three *Contra* two, or foure *Contra* one, see the first Judgement in the Common Bench Michaelmasse 6. Jacobi afterwards.

*Termis Pasche 7. Jacobi, 1609. In the Kings Bench.*

### Trinity Colledge Case.

THE Case was this; King Henry the eight Incorporated the Schollers of Trinity Colledge in Cambridge by the name of Masters, Fellowes, and Schollers: Collegij Sancta et Individua Trinitatis, in the Town and University of Cambridge, and in the 6. Ed. 6. They made a Lease by the name of Master, and Fellowes of Trinity Colledge in Cambridge, leaving out the University: And if this Lease were good or not was the question; And Yelverton argued that this was not a good Lease, and that for the misnaming of the Corporation: And to that he said, to every Corporation, two things were incident: That is, name and place: and if any of those say I and be not certainly recited in a Lease, the Lease shall not be good: And he conceived that this Corporation is founded upon two places, and that one of them: That is, the University is left out, and for that cause the Lease is nothing worth, for if a Corporation hath two names, one of them cannot be omitted, as it is in the first of Mary Dyer 96, 97. and 4. Mary 140. and 150. 11. Eliz. Dyer 278. 35. H. 6. 5. and 6. No more then when it consists of two places one of them may be left out: And for that, if they had been incorporated by the name of Master and Fellowes of Trinity Colledge in Norfolk and Suffolke in a Lease, they could not leave out Norfolk or Suffolke, but both the places ought to be incerted: And by him in the principall case, if the Lease had been made by the name of the Master and Fellowes of Trinity Colledge in the Town, and leave out the University of Cambridge, without question, this shall be void, so here this being impliedly omitted shall be as strong, as if it had been by expresse words excluded, so in the making of every Corporation, the intent of the Founder is to be considered, and for that it seemes the intent of the King in placing that in both places, was first to erect a Colledge, and that to grace the Town, and then he hath placed them in the University, and this was for the instruction in good Arts and Learning, and so for these benefits they have of both these places, nor one nor the

*Misnaming of  
a Corporation.*

Walter

other may be left out: And if the King had been incorporated by the name of Master and Fellowes of *Trinity Colledge in Cambridge*, and in the Market place of *Cambridge*: There though that the Market place was parcell of the Town of *Cambridge*, yet it seemes to him that this cannot be left out, for peradventure the Founder hath a speciall reason to place that there, that is, to have all things necessary for them more neer unto them: Also where any stranger demands any possession of them in *Precipe Quod Reddat*, or such like, he ought to ensue them certainly and precisely: Then a *Fortiore* where they depart with their possessions by their own Act, there they shall not be unknowing of their one names: And *Walter* of the inner Temple argued to the contrary, and he conceived that the Lease is good; and first he argued the ground which hath been taken of the other part, that is, that every corporation ought to be in a certain place, and he conceived that there is a certaine place in this place, that is, the Town of *Cambridge*: And to that, that is said that this Corporation is founded upon two places, he denied that all together, for no more then one materiall Body, may be but in one place *Simul and Semel*, no more may it be in a Body Corporate, which hath allwaies his resemblance to a Body naturall, and for that he denied the case, which hath been put of the other part, of *Norfolk and Suffolk*: And he cyted the opinion of the Lord *Popham in Buttons Case*, in which the Lord *North* was Interested, that a Corporation cannot be limited to a County, as *Probus Homines* of such a County, or *Trinity Colledge* in such a County, but it ought to be restrained to some certaine place, or one Conntry, or a Town: But admit that the Corporation may be founded upon two places, yet he saith that a University is not Locall, but Personall: And to this purpose he cyted two Records one, in 48 H. 3. Which was this; King H. 3. Intending to keep a Parliament at *Oxford*, and knowing that the place was not sufficient to contain all those, which should be there assembled, and the Schollers together, sent his Writ which was directed to the Chancellor and University of *Oxford*, commanding them that they should remove the University to such a place, till the Parliament should be ended: And after he sent his Writ to them againe, which was directed to the Chancellor and University, by which he wiled that they should returne againe, the Parliament being ended, by which Writ he conceived that it appears that the University was not Locall: And this for two reasons.

First inasmuch that this Writ was directed to the Chancellor and University, and every Writ is directed to a person and not to a place.

Secondly the Writ that he should move and remove the University,

city, which is a thing impossible to do if it should be a place: The other Record was 49. *Ed. 3.* And this declares, that there was contention between the Schollers of *Cambridge* and the Towns-men there, and the Schollers went to *Northampton*, and there they made a Petition to the King, that they might erect a University, and the King sent his Writ to the Maior, commanding him that he would not suffer the Schollers to remaine there, and that he would there erect a University, which proves that a University may be erected at the Kings pleasure, and so cannot a place, then admitting that a Corporation may consist upon a place, yet the University not being a place, that shall not be any prejudice to omit it: And he cited a case which was adjudged as he said, in the 26. of *Eliz.* which was thus; The Deane and Canons of *Win-sor* made a Lease for years by the name of Deane and Canons of new *Winsor*: And this was adjudged no variance, and the case of 5. *Ed. 4.* 5. of the Abbot of *Saint Maries in York* which see there, and he said the Lord *Norths* Case was thus: That Christ Church in *Oxford* was incorporate by the name of Deane and Canons of Christ Church in *Oxford*: And they made a Feoffment by the name of the Deane and Canons of Christ Church in the University of *Oxford*, and adjudged a good Feoffment: And he said that in the argument of this case it was said by *Gandy*, that if a corporation were made of *Dale*, and after *Dale* is made into a City, they may make a Lease by the name of a City of *Dale*, and the Lord *Pop-ham* (as he said) put these cases: That is, that if a Corporation be founded of *Oxford*: And that they made a Lease by the name of, &c. In the Precincts of *Oxford*, this shall be a good Lease, yet a thing may be within the Precincts of another place, and not in the place, and in the 32. *Eliz.* was the case of one *Jermin and Wylls*, that if a Corporation be made, by the name of Deane and Chapter of *Saint Maries in Exceter* is good: But they agreed in this case as he said, that if it appeare that they cannot be intended all one, otherwise it should be, and he conceived in the principall case, that it is not necessarily that it should be intended the same place, and for that he conceived in all those cases that the Lease shall be good, and he said that there were neer two hundred Leases upon the same Title, for which, &c.

And after this it was argued in *Michaelmasse* Tearme 1609. 7. *Jacobi* by the Justices: And the opinion of *Crook and Williams* Justices was, that the Lease was good: But *Fenner and Yelverton* to the contrary, and *Flemming* cheif Justice argued that the Lease was not good; but he said this should not be absolutely his opinion; but moved a composition betwixt the parties: But inso-much that the matter was not compounded, in the same *Michaelmasse* Tearme; Judgement

Judgement was praied: And *Williams* Justice brought into the Court a decree out of the Court of Wards concerning the Case which is put in 7. *Eliz. Dyer* and 1. *Coke Parters Case*: And upon the decree appears, that an Information being exhibited there against the Master and fellows of *Trinity Colledge in Cambridge* concerning certain Land they made Title to, by a Devise made to them, by the name of Masters, Fellows and Schollers, of *Trinity Colledge in Cambridge*, and this Devise was made, four and five of *Phil. and Mary*, and the Decree recyted, that upon this were two great Doubts and Questions conceived.

First, If this Devise were good, and also by the *Statute* of 1. and 2. *Phil. and Mary*, which inabled to devise to spirituall Corporations.

And the second point was, That where they were incorporated by the name of Master, Fellows and Schollars *De sancta and Individa Trinitate*, in the University and Town of *Cambridge*, if this devise made to them by the name of Master, Fellowes, and Schollers of *Trinity Colledge in Cambridge* was good, and the Decree rehearsed, that the opinion of all the Justices in *England* was,

First, That it was a good Devise within the *Statute* of one and two *Phillip and Mary*, as it is reported in the Booke before cited.

Secondly, That this was not such a mis-naming of the Corporation which made the Devise voyd, and *Williams* Justice produced this Record, as he sayd to fortify his opinion: And he conceived no difference between a Grant and a Devise, nor no difference when an Estate or conveyance made unto them, and conveyance made by them, and for that he cited the Case in the 19 H. 8. in *Dyer*, where if a man devise Land to the Abbey of *Saint Peters*, where the foundation is *Saint Paul*, this is a voyd devise, and so in a grant. And *Crooke* Justice, to the same Intent. *Yelverton* Justice to that Decree shewed by my Brother *Williams*, I conceive a great Difference.

*Yelverton.*

*Fenner.*

*Flemming.*

First a Will and a grant, for in case of a Will, it sufficeth if they be described by a name, by which the Intent of the Devisor may be sufficiently known, and a man is intended to be *Inops consilij* at the time of the Devise made, and for that that he hath not any to instruct him of the precise name of the Corporation for which, &c. And *Fenner* Justice to the same intent, and if a man devise to one, and his Assignes, as it is a Fee-simple in case of a Devise, so it is not in grant, and so devise to one and his Children, is an Estate Tayl in case of Devise, but not in a grant: *Flemming* cheise Justice to the same intent, and to the Decree he sayd, that this is as good Law,

as

as ever he heard in his life, but yet he conceived also, that there is a great difference between a Grant and a Devise, as if a man devise to a Monke the Remainder over, this is a good remainder, so devise to one the Remainder over, and the particular Tenant refuse, this is good in a Devise, contrary in grant, and to the case which is put by my Brother *Williams* out of the 19 H. 8. *Dyer*, there is a great difference, where there is not any such person at all to take, there the Devise shall be void, as where the Devise to the Abbot of *Saint Peter*, where the foundation is of *Saint Paul*, and where it is a person certain, but all the name is not so precisely recyted, and to that which is sayd by my Brother *Williams*, that no difference between conveyance made to them and by them, I agree to him with this difference, that is, if conveyance be made to them, of what by presumption in Law they are knowing, and are parties as a Fine levied to them, and such like, but of a Devise it is not presumed, that they have knowledge of that till the Death of the Devisor, and he conceived that the Lease is voyd, and this Decree shewed, hath not changed his opinion, but he moved the parties again to an agreement, and would not as yet give Judgment.

*Hitcham* the Queens Attorney, moved the Court for a Prohibition, and the case was this, two Merchants covenanted by Deed with their Factor to allow him ten pound a Moneth for his Wages, and one Merchant sealed the Deed in *England* and the other sealed that upon the Sea, and the Factor came and sued the Merchants in the Admiralty for his wages, and by the Court insomuch that one of them sealed it upon the Land, this is not any thing done upon the Deepe Sea, and for that Prohibition was granted to him. Prohibition.

Upon a Motion made by *Wincolt* of the *Middle Temple* to dissolve a Prohibition granted to the spirituall Court, upon a Libel for Tithes, there the Court took this rule, that when a Consultation is lawfully granted, there a new Prohibition shall not be granted upon the same Libell, and yet they qualified that with this difference, that is, when a Consultation is granted upon any fault of the Prohibition in form by the Misprision of the Clark, or by mis-pleading of any Statute in that, or such like, there a new Prohibition may be granted upon the same Libell, but if Consultation be granted upon the right of the thing in question, there a new Prohibition shall not be granted upon the same Libell, see the Statute of 5 Ed. 3. Prohibition.

Pasch. 9. Jacobi 1609. In the Kings Bench.

**B** Romehead and Spencer Plaintiffs, Rogers Defendant, where an Action of Debt was brought by the Plaintiffs against the Defendant



dant as Administrator during the minority of one *J. S.* and the Plaintiffs shew in their count, that the said *J. S.* at the time of the Writ brought, was, and yet is within age of one and twenty years, and verdict passeth against the Defendant, and *Crews* moved in arrest of Judgment, that the Declaration was insufficient, for they have declared that the Executor was within the Age of one and twenty years, and the Administration during the nonage shall cease when the Infant comes to the Age of seventeen years, so that he may be of the age of 17. 18. 19. or 20. years, and yet the Administration ceaseth, and so of Action against Administrator, and so was the Opinion of all the Justices, and the Judgment was stayed upon that, according to the resolution of *Piggotts Case* 15. *Coke* 29. *a.*

*A married  
wife cannot  
make a Letter  
of Attorney.*

**P** *Lomer* against *Hockhead*, the Plaintiff declares in *Ejectione firme*, upon a Lease made to him by three Husbands and their wives, and that the Defendant ejected him, and at the Issue upon not guilty, and in evidence to prove this Lease, and the delivery of that, was shewed a Letter of Attorney made by the Husbands and their wives, and the counsel of the Defendant takes exception to the Declaration, for they have declared upon a Lease by three Husbands, and their Wives, with a Letter of Attourney to make delivery, and a married Wife cannot make a Letter of Attorney: And so this is not a Lease of the Wives, and so the Plaintiff had declared upon no Lease: And the opinion of all the Court was, that a married Wife could not make a Letter of Attorney: And *Williams* Justice compared this to the case of an Infant, as if an Infant makes a feoffment or a lease, and delivers that with his hand, this is not, but voidable: But if it be executed by Letter of Attorney, that is a disseisin to him, but by *Flimming and Williams*, if the Plaintiffs had declared upon a Lease made by the Husbands only; this had been very good.

*Replevin.*

*Thomas Malin* Plaintiff in *Replevin* against *Thomas Tully*, the case was; The Queen *Mary* was seised of a Park called *Eestwood* Park in her Demesne as of Fee as in Right of her Crown, and so being seised by her *Letters Patents*, let the said Park to two for their lives, and after died: And the Queen *Elizabeth* by her *Letters Patents* recyting the said Lease for lives, and that the said Lessees were alive, granted the said Park to *Humphrey Lord Stafford* and his Wife, and to the Heires of the said *Lord Stafford* of the Body of the said Wife lawfully begotten: And by the said Patent the same Queen by these words, *Ac de Ampliori et Uteriori Gracia, Nostri Volumus et Declaramus, quod si Predictus Dominus Stafford, Solvat seu Solvi faciat prefatto Domina Regina 20 s. ad talem Diem, Tunc concedi-*

*Concedimus, quod predictus Dominus Stafford habebit reversionem predictam sibi et Heredibus suis*: And the Lord Stafford paid the said sum of twenty shillings according to the said *Letters Patents*, and if he shall have Fee-simple or not was the question. And it was objected that he shall not have it, for the words of the Patent are; that if the Lord Stafford paies the money, *Tunc concedimus*, the which words seeme that the Grant shall take effect, *in futuro*, and it was not a present Grant, but when the money shall be paid then shée granted, but it seemes to the Justice, that it was a good Grant immediatly to take effect upon the payment of the money, and the condition was precedent, till that be performed the reversion remains in the Queen *Eliz.* And the Queen might grant by one selfe same Patent as by diverse: See 10. *Assise* 13. 7. *Ed.* 3. 8. *Ed.* 2. Feoffments, and that the reversion shall not extinguish the Estate Tayl, but they may well be together, but otherwise it is of an Estate for yeares or for life.

Warburton Justice, that the King is specially favoured in the Law, and for that he shall not be enforced to attend in case, as other persons ought to make attendance: And for that in case where a common person may make a good Grant, the King also may make a good Grant, and in the case at the Barr, if the Grant had been made by a common Person, it had been good without question: But the first objection that hath been made was, that where a man hath made a Lease for life or for years, upon condition to have Fee, there the particuler Estate shall be drowned upon the increasing of the Estate, but the Statute of *Westminster* 2. preserves the Estate tayl that it shall not be drowned, and that the Fee in this case doth not vest till the condition be performed, for if the Lessee for years or life, surrender before the performance of the condition, the Fee doth never increase, as it is 14. *H.* 8. 20. and the Lord *Chandois* Case, 6. *Coke*: But the Estate tayl remains after the condition performed, and then hath the Fee dependant upon the Estate tayl, and that there is a necessity that there shall be an office, as it was in *Nicholls* Case in the *Com* because of the right and that after the condition performed then the Fee shall vest, *Ab Initio*, and this corporates together partly by the Letters Patents, and partly by the performance of the condition, and so it is in *Butler and Bakers* case that it is not a Grant *in futuro*, but one immediate Grant to take effect *In futuro*, see 2. *H.* 7. for the execution of *Chantrey* and *Grendons* Case in the *Com.* and 2. *H.* 7. If the King grant Land to *J. S.* for life, the remainder to the right Heires of *J. R.* which is in life, the remainder is good, as well as in case of a common person, and so he seemed that Judgement shall be given for the Plaintiff.

Warburton Justice.

Walmesley.

Walmesley Justice agreed, that it shall be remainder and not reversion, as if Lands begin to the Husband and the Wife and to the Heires of the Body of the Husband, the Husband dies, this is a remainder, in the Heires Males and not a reversion, for it cannot grow higher, and it was not in the King as one distinct Estate, before the Grant, and *Formedon* in remainder lieth for it, and though it be misrecited yet it shall be good, and ayded by the Statute of Misrecitalls, and grant of a thousand is suffered to convey the reversion of a thousand by the common Law; and if the recitall were that it was a reversion depending upon the Estate tayl, it was good without question, and the King may grant five hundred reversions if he will, and that the last (*Damus*) is *ex certa scientia et mero motu nostris*, *Damus et concedimus*, that if the Patentee pay twenty shillings, *Tunc sciatis, quod nos de ampliori gracia ea certa scientia et mero motu, nostris concedimus*, &c. and that the word *Volumus* will amount to a Covenant or a Release, as 32. H. 6. The King by his Patent by these words (*Volent*) that he shall be impleaded, and this amounts to a release, and to words which intends expressly words of Covenant may be pleaded as a Grant in case of the King, as it is 25. Ed. 4. So if a common person license another to occupy his Land, this amounts to a Lease of Land if the time be expressed, so if a man grants to another that he shall have and enjoy his Land to him and his Heires, that by that Fee passeth: And if the King grant reversion to begin at *Michaelmasse*, the Grant is void, for that it is to begin totally at *Michaelmasse*, and doth not looke back to any precedent thing: But if it relate to any precedent Act, then that shall be good by relation, and shall passe *ab Initio*; see *Com. Walsinghams Case* 553. b. that in such case the performance of the condition divests the Estate out of the King, and there is no difference in this case betwixt the King and a common person, and agreed in the case of *Littleton*: Where a man makes a Lease for yeares upon condition to have Fee, that the Fee shall not passe till the condition be performed, and with this agrees 2. R. 2. But if a man makes a Charter of Feoffment, upon condition, that if the Feoffee enjoy the Land peaceably for fifteen years, that the Feoffment shall be void: In this case the Fee-simple determineth by the performance of the Condition, and in this case the Fee passeth, *ab Initio*, by the Livery as in 10. Assise 18. Assise 1. 44. Assise 49. Assise. And he agreed that the words *Habeat et Teneat* the Reversion passes, and this is good Fee-simple, and this refers to the first *Damus et Concedimus*, and so concluded that he seemed that Judgement shall be given for the Plaintiff.

Coke cheife Justice accordingly, and he conceived that there are two questions upon the substance of the Grant.

And

And to the first objection, that hath been made, that is, that reversion was granted, and increase of an Estate cannot be of a reversion; and in all these cases which have been put they are of an Estate in possession, and so is the case of *Littleton* also, and he agreed that it shall not be good, if it be not good, *ab Initio*, that though there be not other words then *Reversionem predictam*: That it shall be good.

And to the second point upon the former: He conceived that the Grant is but a Grant, and that the condition is but precedent Limitation, when the Estate of Fee-simple shall begin, and so it is said by *Montague*, in *Colthurst and Brinkins Case* in the *Com.* And further he saith that there are four things necessary for increasing an Estate.

First, that it ought to be an Estate, upon which the increasing Estate may increase.

Secondly, the particular Estate ought to continue, for otherwise it is grant of a reversion in *Futuro*.

Thirdly, That the Estate which is to increase ought to vest by the performance of the Condition; for if there be disturbance that it cannot then vest, then it can never vest.

Fourthly, that both the Estates as well the particular Estate as the Estate which is to increase ought to have their beginning by one self same Deed, or by diverse Deeds delivered at one self same time.

And to the first, and to prove that he cyted 44 *Ed.* 3. Attaint 22. Lessee for yeares upon condition to have Fee, grants his Estate, the Fee doth not increase upon the performance of the condition, for then it shall passe as a Reversion, and so the particular Tenant surrenders his Estate, as it is sayd 14. *H.* 8. For if the Privy be destroyed the Fee will never increase, but there is no such pycity, but that if the substance of the Estate remains, though it doth not remain in such form, as it was at the first Reversion, the Estate may well increase, as if Lands be given to the Husband and wife and to the Heirs of the Husband, upon the Body of the Wife to be begotten, the Wife dies, and the Husband is Tenant after possibility of Issue extinct, yet he may well perform the condition, for the Estate remains in substance, and with this agrees, 20 *H.* 6. Ayd; and so it is if a Lease be made to two for yeares upon condition to have fee, one dies, the other may perform the Condition, and shall have Fee-simple, as it is agreed by 12. *Assise* 5. the reason is that the privy remains and the Estate also in substance.

Thirdly, As to that also, it seems that it ought to vest upon the performance of the condition, which is the time limited for the beginning of the Estate, and if it do not vest then, it shall never vest, and if it do not vest without Office in this case, it shal never vest

at all, but it is for the Honour of the King, that his grant shall have his effect, and 49 Ed. 3. 16. *Isabell Goodcheaps case*; she devised her Lands to her Executors to be sold, and dyes without Heir the King hath that by Elcheat, yet the Executors may sell it, and for that divest the Estate out of the King, and so was the Lord Lovells Case, and the reason is for the necessity, for the Prerogative of the King shall do no wrong, and there need no continuance of the Estate of the part of the Lessor, but of the part of the Lessee, and for that if the Feoffor make a Feoffment, or grant his Estate, this shall not make prejudice or alteration of the Estate, and for that if the King refuse to receive the Money, yet if it be tendered the Fee-simple shall vest in the Patentee, and the simple upon that shall increase, see 31 Ed. 1. Feoffments and Deeds B. 32. *Quid Iuris Clamat* be.

And to the fourth it seems also, that both the Estates ought to be created and granted by one self same Deed, or by divers delivered at one time, *Quia que in continenti sunt pro uno habeantur & reputantur*, as if a man makes a Lease for years upon Condition to have in tayl, upon condition to have in Fee, this second condition is void, for it ought to be all one Grant, and cannot be intire, upon the privy of the first grant, and it is not material though that the first Estate be drowned upon the performance of the condition, as if the King makes a Lease for life, the Remainder in tayl upon condition, that if the Tenant for life pay twenty shillings, that he shall have Fee, this shall be a good Grant, and the Fee well vested by the performance of the condition, though that the particular Estate for life shall not be drowned.

And to the second point, that is, that the Grant of the King shall not be good, for that that it is by the words, Reversion afore-said, he agreed that if the King makes a Grant to one intent, that shall not enure to another intent: But this shall enure to the intent for which it is made, *Ut res magis vale et quam periat*, and it is for the dishonor of the King, to make an unconscionable Grant. And to the Objection which is made, that the King is not understanding of Law, to that he answered, that the King is (*Caput Legis*) and for that shall not be intended to be ignorant of it, and for that if a grant may have two intendments, one to make the Grant good, the other to make the Grant voyd, it shall be intended, and expounded in the better sense, that is, to make the Grant Good, and not to make the Grant voyd, for this was *Iniqua expositio*, and also he sayd that the Grant shall be good for the first word (*Concedo*) though it had not been subsequent also, as if a man grant a Rent charge, and if it be behinde, that the Grantee may distrain for the first Grant, and the Grant is not of a Reversion *In futuro*, but grant that



that if the condition be performed that then the Fee doth pass *In futuro*; and it seemed to him, that it was a good devise to prevent that the Estate tayl should not be discontinued by Fine nor otherwise, untill the Condition were performed, and so of recovery also; for if the King grant an Estate tayl, and after grants the Reversion in tayl, this second intayl is within the intent of the Statute; and when the Issue of the first Tenant in tayl shall not be barred, the Estate of the Tenant in tayl in Remainder shall not be barred, see the Lord *Barkleys case in the Com. fol* and 7 *Ed. 4.* and as to the pleading he sayd, that when the Issue is offered, which depends upon matter in Law, there is no necessity to take travers upon the matter in Law, for it doth not belong to lay men to decide the matter in Law, and for that he concludes, that the Grant in substance is good, and in form exquisite, and that the Issue in tayl in Reversion shall not be barred, for *Quod non in principio valet, non valebit in accessario*, and that Judgment ought to be for the Plaintiff, which was done accordingly.

**I**N *Ejectione firme* against Gallop, after Verdict and Judgment for the Plaintiff a Writ of *Habere facias Possessionem* was awarded and executed, and returned and fyled, and after the same Defendant re-entred and outed the Plaintiff, and Attachment was awarded, and it seems that if the Writ had not been returned, that then a new Writ shall be awarded, and the Attachment was awarded upon *Affidavit*.

*Re-entry after possession executed.*

**I**N Action upon the case against Trotman, the words were, Thou sayest thou art an Attorney, but I think thou art no Attorney, but an Attorneys Clark in some Office, but if thou be an Attorney I will have thee pickt over the Barr the next Tearme, and thy Eares nailed to the Pillory, and it seems that these words are not Actionable.

*Slander of Attorney.*

**I**N waging of Law of Summons in Dower, *In petit Cape*, there ought to be two summons only, and if it be Grand Cape, then there ought to be two Summoners and two Veiwers, and Summons upon the Land is sufficient to give notice of the Demandant, of the thing demanded, and the day in Court. That in Waging Law, the Lord Coke sayd, that the Defendant himself ought to swear, *De fidelitate*, and eleven others, which are named in the Statute of *Magna Charta*, chapter *Testes fideles* ought to swear *De credulitate*.

*Grand Cape P. tit Cape.*

*Waging Law.*

Release.

**I**F Tenant for life be the Remainder in tayl to another; the Remainder in Fee to the Tenant for life, and the Tenant for life releases to the Tenant in Tayl, the Release is good to passe the Remainder in Fee to the Tenant in Tayl, for to this purpose the Tenant in tayl hath sufficient possession, upon which the Release may enure, but it shall not be good to pass the Estate for life, and 19 H. 6. and 9 H. 7. If Tenant in Tayl in Remainder, Disseise Tenant for life, he doth not gain Fee-simple by *Fulthorp*, but if there be Grand-Father, Father, and Sonn, and the Father makes a Feoffment the Grand-Father dies, the Father dies, the Sonn is barred, so if the Sonn had levied a Fine being Tenant in tayl, 33 and 39 H. 6. 43. a. 21 Ed. 4. Discontinuance.

*Pasc. 7 Jacobi, 1609. In the Common Bench.*

Warbrooke and Griffin.

Inn-Keeper in  
London.

**B**etween Warbrooke and Griffin, a Guest brought a Horse into an Inn in London to be kept, the which stayed there so long, till he had eaten out his Worth, and then the Inn-Keeper caused the said Horse to be pryed, and then sold him according to the custome of London, and it seems well he might do it, and that the Sale was lawfull, for the Inn-Keeper, as to the Person of his Guest ought to receive him, and he is compellable to do it, as it is 5 Ed. 4. 2. and 22 Ed. 4. And for his Goods he ought to keep them safe, and of the other part the Guest ought to pay the Inn-Keeper, as well for the meat of his Horse as for his own, as it is 28 H. 6. And it should be inconvenient that he should be put to his Action for, &c. And for preventing this mischeife, the Inn-keeper may detaine the Horse of his Guest, till he be satisfied, and it seems to Coke cheife Justice, that an Inn-Keeper is not chargeable with the Goods of any, which is not lodged in the Inn, and the Goods must be lost by default of the Inn-Keeper, and that the Inn-Keeper is not compellable to receive the Horse of any, if the Master be not lodged, and if a Neighbour of the Inn-Keeper come to the Inn-Keeper he shall not answer for the Goods, for he is not lodged, but as a Tipler, and so if an Inn-Keeper invite any to his House *Ad Prandendum aut Canandum*, the Inn-Keeper shall not be charged, as it 35 H. 8. For it was agreed that the Guest ought to averr that he was lodged in the Inn. And Foster Justice sayd, that it was adjudged in the case of one *Perin of the Black Swan in Holborne*, that by the custome of London, an Inn-Keeper may sell a Horse which remains with him to be Kept, and hath eaten more then he is Worth, and so it was sayd by Foster, that where a Haberdasher of

you 2 years had been man-  
aged by the Inn-Keeper  
and the Inn-Keeper say.

Inn-Keeper to E. Lang. our  
Bury with 9. 5. 10. 12. 14. 16. 18. 20. 22. 24. 26. 28. 30. 32. 34. 36. 38. 40. 42. 44. 46. 48. 50. 52. 54. 56. 58. 60. 62. 64. 66. 68. 70. 72. 74. 76. 78. 80. 82. 84. 86. 88. 90. 92. 94. 96. 98. 100.

at averr

of London came to an Inne, and there sold divers Hats, and after went to a Faire, and left divers other Hats in the Inne, the which in his absence were stollen, and the Inne-Keeper should not answer for them, for that that the Haberdasher was not lodged in the Inne at that time, and this was the Case of one Coley in the 25. of Eliz. But Sir Edwin Sands lodged in an Inne and there left a Trunck, and went to meet the King, the Trunck remaining in the Inne, in his absence it was stollen, and the Inne-Keeper was charged, *Quere* the Difference, if the Owner desire that his horse should go to grass, the Inn-Keeper shall not answer, but if an Inn-Keeper receive the horse, and of his own head puts the horse to grass, and he is stolln, there the Inn-Keeper shall be charged, and though the Inne-Keeper deliver the Key of the Chamber to the Guest, yet the Inne-Keeper shall answer for the goods which are stollen, for it is an implied promise of every part, that is, of the part of the Inne-Keeper, that he will preserve the Goods of his Guest, and of the part of the Guest, that he will pay all duties and charges, which he caused in the house, and that the Inne-Keeper may retain (without custome, by the Common Law, the Horse of the Guest as a pledge till he be satisfied of all dues, and so a Tayler, and Goods taken in *Wisternam*, But the Inne-Keeper cannot work the horse of his Guest in such a case, nor sell his Goods though that they be *Bona peritura*.

Trinity 7. Jacobi, 1609. In the Common Bench.

Colledge of Physicians Case.

**T**HOMAS Bonham brought an Action of false Imprisonment against Doctor *Alkins* and divers other Doctors of Physicke: The Defendants justified, that King H. 8. Anno Decimo of his Reigne, founded a Coll dge of Phisitians, and pleaded the *Letters Patents* of their Corporation: And that they have Authority by that to chose a President, &c. as by the *Letters Patents*, &c. and then pleads the *Statute* of 32 H. 8. chap. 40. And that the said Doctor *Alkins* was chosen President, according to the said Act and *Letters Patents*, and where by the said Act and *Letters Patents* it is provided, that none shall practise in the City of London or the Suburbs of that, or within seven miles of the said City, or exercise the faculty of Physicke, if he be not to that admitted by the Letters of the President and Colledge, sealed with their common Seale, under the penalty of a hundred shillings, for every Month (that he not being admitted) shall exercise the said faculty, further we wiland grant for us and our Successors, that by the President and Colledge

Action of false  
Imprisonment.

Colledge of the Society for the time being, and for their Successors for ever, that they may chose foure every yeare, that shall have the overseeing, and searching, correcting, and governing, of all in the said City being Physitians, using the faculty of Mejecines in the said City, and other Physitians abroad whatsoever using the faculty of Physicking by any meanes frequenting and using, within the City or Suburbs thereof, or within seven miles in compasse of the said City, and of punishing them for the said offences, in not well executing, making, and using that: And that the punishment of those Physitians using the said faculty, so in the premisses offending, by Fines, Amercements, Imprisonments of their Bodies, and by other reasonable and fitting waies shall be executed: Note the preamble of these *Letters Patents* is, *Quod cum Egregij officij nostri munus arbitremur, ditionis nostra, Hominum felicitati omni ratione Consulere: Id autem vel inprimis fore, si improborum conaminibus tempestive occurramus, apprime necessarium fore duximus, improborum quoque hominum, qui medicinam Magis avaritia sua causa, quam ullius bonae conscientiae fiducia proficiantur unde Rudi et credula plebi plurima incommoda oriuntur, audaciam compefcere.* And that the Plaintiff practised in London, without admission of the Colledge, and being Summoned to appeare at the Colledge, and examined if he would give satisfaction to the Colledge according to the said *Letters Patents* and *Statute*, he answered that he had received his decree to be Doctor of Physick by the University of Cambridge, and was allowed by the University to practise, and confessed that he had practised within the said City, and as he conceived, it was lawfull for him to practise there, that upon that the said President and Commonalty fined him to a hundred shillings, and for not paying of that and his other contempt, committed him to Prison, to which the Plaintiff replied as aforesaid, and upon this demurrer was joyned: And Harris for the Defendant, saith, that this hath been at another time adjudged in the Kings Bench, where the said Colledge imposed a Fine of five pound upon a Doctor of Physick which practised in London without their admission, and for the non payment of that, brought an Action of Debt, and adjudged that it lay well, and that the *Statute* of 32. H. 8. extends as well to Graduates, as to others, for it is generall, and Graduates are not excepted in the *Statute*, nor in the *Letters Patents*, and all the mischeifes, intended to be redressed by this, are not expressed in that, and the *Statute* shall not be intended to punish Imposters only, but all other which practise without examination and admittance, for two things are necessary to Physitians, that is, learning and experience, and upon that there is the proverb, *Experto credo Roberto*: And the *Statute* intends that none shall practise here but

Serjeant Harris the younger.

but those which are most learned and expert, more then ordinary : And for that the *Statute* provides, that none shall practise here without allowance and examination by the Bishop of *London* and the Deane of *Pauls*, and four learned Doctors : But in other places the examination is referred only to the Bishop of the Diocesse, and the reason of the difference is, for that, that *London* is the hart of the Kingdome : And here the King and his Court, the Magistrates and Judges of the Law, and other Magistrates are resident, and with this agreed the government of other well governed Cities in *Italy* and other Nations, as it appeares by the preamble of the said *Letters Patents* : and it appeares by the *Statute*, that this was not intended to extend to Imposters only, for that that the word Imposter is not mentioned in the *Statute* : And the *Statute* provides that they shall be punished, as well for doing and using, as for ill using : And also it is provided that the *Statute* of 1. *Marie* 1. Parliament, chap. 9. That the Gardians, Goalers, or Keepers of the Wardes, Goales, and Prisons within the City and precinct of that, shall receive into his Prison all such person and persons so offending which are sent or committed to them, and those safely shall keep without Bayl, till the party so committed, shall be discharged by the said President, or other person by the said Colledge to that authorised, by which it appeares, that the Goalers, Keepers of Prisons, have power to retain such which are committed : That then the President shall have power to commit, for things Implied are as strong as things Expressed ; as it appeares by the *Com. Stradlinge and Morgans Case* : And also in the Earle of *Leicesters Case*, where it is agreed, that Joynture before Coverture cannot be waved, and this is implied within the *Statute* of 27. *H.* 8. And so the *Statute* of 2. *Ed.* 6. Provides that after seven yeares Tythes shall be payd, by which it is Collected by Implication, that during seven yeares, Tythes shall not be payd ; and so he prayed Judgement for the Defendants.

*Dodridge* Serjeant of the King, for the Plaintiff said, that the *Statute* of 24 *H.* 8. chap. 5. and the *Letters Patents* gives power to four Censors to punish for ill executing, doing, and using the faculty of a Phisician, and the Plaintiff was not charged for ill executing of it, doing or using : But it is averred, where *Revera* the Plaintiff was nothing sufficient to exercise the said Art, and being examined, lesse apt to answer, and thereupon they forbade him, and being sent for and not appearing, was amerced five pound, and order that he should be Arrested, and being Arrested, upon his appearance, being examined if he would submit himselfe to the said Colledge, he answered and confessed, that he had practised within the said City, being a Doctor of physick as aforesaid, as wel



to him it was lawfull, and that he would practise here againe, for which he was committed to Prison: So that he was amerced for his contempt in the using of the said Act, and committed to Prison for his answer upon his examination: And he conceived that there are two questions considerable.

First, if the Colledge may restraine a Doctor of phisick of his practise in *London*.

Secondly, admitting that they may, then if these are the causes for which they may commit by their *Letters Patents*, the first reason is drawn from the *Letters Patents*, and the said *Statutes*, in which he said that the intent of the King was the end of his work: And this intent shall be expounded for three reasons apparent in the words contained in the Grant.

First, *Intempestive Conatibus occurrere*.

Secondly, *Improbiorum Hominum, qui medicinam Magis avaritia sua causa, quam ullius bona Conscientia fiducia proficiebantur, audaciam Compescere*.

Thirdly, which would invite learned men to practise here, and for that would, *quod Collegium presertim Doctorum et graviorum virorum qui medicinarent in urbe nostra Londino et suburbibus infra septem millia passuum in urbe quaque versus, publice Exerceant institui volumus et imparamus*: And further he said, that there are three sorts of men, which meddle with the Body of a man.

First, is the learned man which reads all Bookes extant, and his knowledge is speculative, and by that he knew the nature of all simples.

And the second is practise, the knowledge of which is only his experience, he may give *Probatum est*: But the ignorance of the cause of the disease, and the nature of the things which he applies for the cure of that.

And the third is an Imposter, which takes upon him the knowledge which he hath not, and every of them the Colledge may punish, for *Male utenda, faciendo vel exequendo*, by what way they will: And this was not the first care which was had, for in the 9. H. 5. was a private Act made for Phisicians, by which there is great regard to them which are learned and educated in the University: And for that the Act provides that they shall not be prejudicall to any of the Universities of *Oxford* and *Cambridge*, and with this agrees 3. H. 8. 11: and the priviledges of them, and the *Dotti et graves homines*, mentioned in the *Letters Patents*, are the learned men mentioned in the Act, for the *Statute* provides that they shall punish according to these *Statutes*, and late edicts: And by the former Lawes the Universities, that their priviledges were excepted, and by their former *Statutes*, the *Letters Patents* ought

ought to be directed, for it is referred to them: Also the *Statutes* of this Realme have alwaies had great respect to the Gradiats of the Universities, and it is not without cause, for *Sudavit et Altit*, and hath no other reward but this degree which is Doctor, and for that the *Statute* of 21. H. 8. prefers Graduates, and provides that Doctors of Divinity or Bachelors shall be capable of two Benefices with Cure without dispensation: And so 13. *Eliz.* provides that none shall be presented to a Benefice above the value of thirty pound *per annum*, if he be not a Doctor or Bachelor of Divinity: And to the objection, that none shall practise in *London* or seven miles circute of it without licence, that this clause shall be expounded according to the matter, and to that he agreed, for the other branches of the *Statute* are made to cherish grave and learned men, and for that it shall not be intended, that this branch was made for the punishment of those, but of others which the *Statute* intended to punish.

And to the second objection, that every Doctor is not the learned and grave man intended within the *Statute*, for the knowledge of many of them is only speculative without practise, to that he answered, that all their Study is practise, and that if they have no practise of themselves, then they attend upon others which practise, and apply themselves to know the nature of Simples.

And to third objection, that in *London* ought to be choyce men, for the Statute appoints that they shall be examined by the Bishop and Deane and four others at least, and for that there is a more strict course for them, then in other places, to that it is agreed: But he said that in the University there is a more strict course then this, for here he ought to be publickly approved by many after that he hath been examined and answered in the Schooles, to diverse questions, and allowed by the Congregation house: And 35. H. 6. 55. Doctor is no addition, but a degree, (*quia gradum et progressionem Doctrinæ provenit*, to that, and that Doctor is teacher, and that he was first taught by others as Scholers, afterwards he is Master, and *Doctor dicitur a docendo, quia docere permittitur*, and they are called Masters of their faculty, and that the Originall of Doctor came of the Sinagogue of *Jewes*, where there were Doctors of Law; and it appears that they had their ceremonies in time of H. 1. And when a man brings with him the Ensigne of Doctrinæ, there is no reason that he should be examined againe, for then if they will not allow of him, he shall not be allowed, though he be a learned and grave man, and it was not the intent of the King to make a *Monopoly* of this practise.

And to the second point that he propounded, it seemes that

the Justification is not good, which is, *Quia non compernit*, upon Summons, he was amerced; and ordered that he shall be arrested, and being arrested, being examined if he would submit himself to the Colledge, he answered that he was a Doctor, and had practised and would practise within the sayd City, as he conceived he might lawfully do, and for that shewing of this case he was committed to prison, and he conceived two things upon the Charter.

First, That it doth not inhibit a Doctor to practise, but punisheth him for ill using, exercising, and making, and may imprison the Emperick and Imposter, and so prayed Judgment for the Plaintiff, and after in *Hillary* Term, in the same year, this case was argued by all the Justices of the Common Bench, and at two severall dayes, and the first day it was argued by *Foster*, *Daniell*, and *Warburton* Justices, at whose Arguments I was not present, but *Foster* argued against the Plaintiff, and *Daniell* and *Warburton* with him, and that the Action of false imprisonment was well maintainable. And the second day the same case was argued again by *Walmesley* Justice, and *Coke* cheife Justice, and *Walmesley* argued as followeth, that is, that the Statute of 3 *H. 8.* was in the negative, that no person within the City of *London* or seven Miles of that, take upon him to exercise or occupy, as Physician or Chirurgeon, &c. And he doth not know in any case where the words of the Statute are negative, that they admit any Interpretation against that but one only, and that is the Statute of *Marlebridge* chapter 4. Which provides that no Lord shall distrain in one County, and the beasts distrayned drive into another County, in which case though that the words are negative, yet if the Lord distrain in one County, he may drive the Beasts to his Mannor in another County, of which the Lands, in which the distresse was taken were held, but it is equity and reason in this case, that the Statute should admit such exception, for it is not of malice, but for that, that the Beasts may remain within his Fee, but in the principall case there is not the like reason nor Equity, And also the King *H. 8.* in his Letters Patents recites as followeth, that is, *Cum Regij officij nostri munus arbitremur, disionis nostri hominum felicitati omni ratione consulere, id autem vel improprimis fore, si Improborum conatibus tempestive occurremus, apprimere necessarium duximus improborum quoque hominum, qui medicinant magis avaritia sue causa quam ullius bone conscientie fiducia profitebantur, &c.* By which it appears, that it is the Office of a King to survey his Subjects, and he is as a Physician to cure their Maladies, and to remove Leprosies amongst them, and also to remove all fumes and smells, which may offend or be prejudiciall to their health, as it appears by the severall Writs in these severall cases provided, and so if a man be not right in his Wits, the King

*Walmesley.*

is to have the Protection and Government of him, least he being infirme, wast, or consume his Lands or Goods, and it is not sufficient for him that his Subjects live, but that they should live happily, and discharge not his Office, if his Subjects live a life, but if they live and flourish, and he hath care as well of their Bodies as of their Lands and Goods, for Health for the Body is as necessary as vertue to the minde, and the King *H. 8.* to expresse his extraordinary care of his Subjects made the said Act, in the third year of his Reigne, which was the beginning of his Essence, to that purpose, and by the Common Law, any Phisician which was allowed by the University might practise and exercise the sayd faculty within any place within *England*, without any dispensation, examination, or approbation of any, but after the making of the sayd Act made in the third year of King *H. 8.* none may practise, exercise, or occupy as Phisician or Surgion within the City of *London* and seven miles of that, if he be not first examined, approved, and admitted by the Bishop of *London*, and the Dean of *Paules* for the time being, calling to them, foure Doctors of Phisick or Chirurgions, &c. And that no practiser may occupy or exercise the sayd faculty out of the sayd Precincts, if he be not first examined, approved, and admitted by the Bishop of the Diocess, or in his absence, by his Vicar generall, every of them calling unto him such expert persons in the said faculty, as their discretions thinks convenient, and the reason of this difference as he conceived, was for that that in this City, and the sayd Precincts, the King and all his Councell, and all the Judges and Sages of the Law, and divers other men of quality and condition, live and continue, and also the place is more subject unto Infection, and the Heir more pestiferous, and for that there is more necessity, that greater Care, diligence, and examination be made of those which practised here in *London* and the precincts aforesayd, then of those which practise in other places of the Realm, for in other places the People have better aire, and use more exercise, and are not so subject to Infection, and for that there is no cause that such care should be used for them, for they are not in such danger, and in the Statute there is not any exception of the Universities nor of those which are Gradiats there, and for that they shall be tryed by the sayd Act, and the Statute of 14 *H. 8.* chapter 5. Only excepts those which are Gradiats of *Oxford* or *Cambridge* which have accomplished all things for the form without any Grace; and if this Exception shall be intended to extend to others, then all the University shall be excepted by that, and such exception was too generall; and over he sayd, that the Plaintiff gave absurd and contemptuous answer, when he being cyted before them, sayd that he would not be ruled nor directed by them (being such grave and

and learned men; & for that that he hath practised against the Statute he was worthily punished and committed, for it should be a vain Law if it did not provide punishment for them that offend against that, and *Bracton* saith, *Nihil est habere Leges, si non sit unus qui potest Leges tueri*, and for this here are four grave and discreet men to defend and maintain the Law, and to punish all Offenders against that, according to the Statute, by Imprisonment of their Bodies and other reasonable wayes, and the sayd four men have the search as well of those men, as of other Mediciners, and the Statute of 1 *Marie* provides that the Keepers of Prisons, shall receive all which committed by the sayd four grave and learned men, and though there be great care committed to them by the sayd Statute, and the sayd Letters Patents, yet there is a greater trust reposed in them then this, for we commit to them our lives, when we receive Phisick of them, and that not without cause, for they are men of Gravity, learning, and Discretion, and for that they have power to make Lawes, which is the Office of the Parliament, for those which are so learned may be trusted with any thing, and for the better making of these they have power to assemble all the Commons of their Corporation, and the King allows of that by his Letters Patents, for it is made by a Congregation of Wise, learned, and discreet men, and the Statute of 1 *Marie* inflicts punishment upon Contempts, and not for any other offences, and they held a Court, and so may commit as every other Court may for a contempt of common right, without act of Parliament, or Information, or other legall form of proceeding upon that, as it appeares by 7 *H. 6.* for a contempt committed in a Leet, the Steward committed the Offender to Prison, and it was absurd to conceive that the Statute will allow of commitment without cause, and it is a marvelous thing that when good Lawes shall be made for our health and Wealth also, yet wee will so pinch upon them, that wee will not be tryed by men of experience, practise, and Learning, but by the University, where a man may have his Degree by grace without merit, and so for these reasons he concluded that this Action is not maintainable.

*Coke.*

*Coke* cheife sayd, that the Cause which was pleaded for, that the Plaintiff was committed, was for that that he had exercised Phisick within the City of *London* by the space of a Moneth, and did not very fitly answer, for which it was ordained by the Censors that he should pay a hundred shillings, and that he should forbear his practise, and that he did not forbear, and then being warned of that, and upon that being summoned to appear did not appear, and for that it was ordayned, that he should be arrested, and that after he was summoned again; and then he appeared, and denyed to pay the hundred



hundred shillings, and he sayd that he would practise, for he was a Doctor of Cambridge, and upon that it was ordained that he should be committed, till he should be delivered by the Doctors of the Colledge, and upon this was the Demurrer joyned, and in pleading the Plaintiff sayd, that he was a Doctor of Philosophy and Physick, upon which the Lord took occasion to remember a saying of Gallen, that is, *Ubi Philosophia desinit, ibi medicina incipit*, and he sayd the only question of this case depends not upon the payment of the sayd hundred shillings, but upon the words of the Letters patents of the King, and the said two Statutes, the words of which are, *Concessimus eidem presidenti, &c. Quod nemo in dicta Civitate, aut per septem milliaria in circuitu ejusdem exerceat dictam facultatem, nisi ad hoc, per dictum presidentem & communitatem seu sucscires, eorum qui pro tempore fuerunt, admissus sit, per ejusdem presidentis & Collegij titeras sigillo suo communi sigillatas sub pena centum solidorum pro quolibet mense quo non admissus eandem facultatem exercuit, dimidium inde nobis, & heredibus nostris & dimidium dicto presidenti & Collegio applicandum, & preterea volumus & concedimus pro nobis, &c. Quod per presidentem & Collagium communitationem pro tempore episcientium, & eorum successores in perpetuum, quatuor singulis annis per ipsos eligantur, qui habeant supervisum, scrutinium, & correctionem & gubernationem omnium & singulorum dicta Civitatis medicorum utentium facultate, medicina in eadem Civitate, ac aliorum medicorum, fornicariorum quorumcunque facultatem illam medicina, aliquo modo frequentantium & utentium infra eandem civitatem & suburbia ejusdem sibi septem milliaria in circuitu ejusdem Civitatis ac putationem eorundem pro delectis suis, in non bene exequendo, faciendo & utendo illa, nec non supervisum & scrutinium hujusmodi medicorum & eorum receptionem, per predictos medicos sive aliquem eorum hujusmodi legeis nostris pro eorum; Infirmis curandis & suavandis, dandis imponendum & utendis quoties & quando opus fuerit, probo modo & utilitate eorundem legiorum nostrorum; Ita quod puniatio hujusmodi medicorum utentium dicta facultate medicina sic in premissis de linquentium, per Fines Amerciamenta, Imprisonamenta corporum suorum & per alas vias rationabiles & Congruas exequantur, as it appears in Rastal Physitians 8018. 392. So that there are two distinct Clauses.*

The first, if any exercise the sayd Faculty by the space of a Moneth without admission by the President, &c. shall forfeit a hundred shillings for every Moneth be that good or ill, it is not materiall, the time is here only materiall, for if he exercise that for such a time, he shall forfeit as aforesayd.

The second clause is, that the President, &c. Shall have *Scrutinium Medicorum*, &c. & *puniitionem eorum pro alicetis suis in non bene*

*bene faciendo, utendo & exequendo, &c.* And for that the President and the Colledge may commit any delinquent to Prison: And this he concluded upon the words of the *Statute*, and he agreed with *Walmesley*, that the King hath had extraordinary care of the health of the Subjects. *Et Rex censetur habere omnes Artis in sermo pectoris*, and he hath here pursued the Course of the best Physicians, that is, *Removens & promovens, removens Improbos illos, qui nullis bona conscientia fiducia profitabantur & audaces, & promovens ad sanitatem*: And for that the Physician ought to be profound, grave, discrete, grounded in learning, and soundly Studied, and from him commeth the medicine, which is *removens & promovens*.

And it is an old rule, that a man ought to take care, that he do not commit his Soul to a young Divine, his Body to a young Physician, and his Goods or other Estate to a young Lawyer, for in *Juveni Theologo est Conscientia detrimentum in Juveni Legislatore bur-si detrimentum et in Juveni Medico Cimatorij incrementum*, for in these cannot be the privity, discretion, and profound learning which is in the aged: And he denied that the Colledge of Physicians is to be compared to the University, for it is subordinate to that, *Cantabrigia est Academia nostrae nobilissima totius Regni oculus, et sol ubi humanitas et doctrina simul fluant*: But he said, when he names *Cambridge* he doth not exclude *Oxford*, but placeth them in equall Rank: But he would allwaies name *Cambridge* first, for that was his Mother: And he saith that there is not any time, *Pro non bene faciendo, utendo et exequendo* for this, *non suscipit Manus et Minus*, for so a man may grievously offend in one day, and for that in such a case, his punishment shall be by Fines, amercements. Imprisonments of their Bodies and other waies, &c. But if practise well, though it be not an offence against the *Letters Patents* and the *Statutes* yet the punishment shall be but pecuniary, and shall not be Imprisoned, for if he offend the Body of a man, it is reason that his Body shall be punished, for *Eodem modo quo quis delinquit, eodem punietur*, but if a grave and learned Doctor or other, come and practise well in *London* by the space of three weekes and then departs, he is not punishable by the said Colledge, though that they be without admission, for peradventure such a one is better acquainted with the nature and disposition of my Body, and for that more fit to cure any Malady in that then another which is admitted by the Colledge, and he said that it was absurd to punish such a one, for he may practise in such manner in despite of the Colledge, for all the Lords and Nobles of the Realme, which have their private Physicians, which have acquaintance with their Bodies, repaire to this City, and to exclude those  
of

of using their advise, were a hard and absurd exposition, for the old verse is, *Corporis auxilium medico committe sodali*: And also he said that the said President and Colledge cannot commit any Physician, which exerciseth the said faculty without admission, for the space of a Month, nor bring their Action before themselves, nor levy that by any other way or meanes: But ought to have their Action or exhibit an Information upon the *Statute*, as it appears by the Book of Entries, for they ought to pursue their power which is given to them by the *Statute*, for otherwise the penalty being given, the one Moytie to them, and the other to the King, they shall be Judges in *Propria causa*, and shall be Summoners, Sheriffs, Judges, and parties also; which is absurd. for if the King grant to one by his *Letters Patents* under the great Seale, that he may hold Plea, although he be party, and if the King doth not appoint another Judge, then the Grantee which is party, the Grant is void, though that it be confirmed by Parliament, as it appeares by 8. H. 6. 44. Ed. 3.

The Abbot of Readings Case, for it is said by *Herle* in 8. Ed. 3. 30. *Tregores Case*, that if any *Statutes*, are made against Law and Right, and so are these, which makes any man Judge in his own cause, and so in 27. H. 6. *Fitz. Annuity* 41. that the *Statute of Carlisle* will that the order of *Cisterians* and *Augustines*, which have Covent and Common Seale, that the Common Seale shall be in keeping of the *Prior*, which is under the Abbot, and foure others which are the most Sages of the house, and that any Deed sealed with the Common Seale which is not so in keeping shall be void, and the opinion of the Court that this is a void *Statute*, for it is impertinent to be observed, being the Seale in their keeping, the Abbot cannot seale any thing with it, and when that it is in the hands of the Abbot, it is out of their keeping, *ipso facto*: And if the Statute shall be observed, every common Seale shall be defeated by one simple surmise, which cannot be tryed, and for that the Statute was adjudged void, and repugnant: And so the Statute of *Glocester* which gives *Cessavit* after Cesser by two yeares to be brought by the Lessor himselfe, was a good and equitable Statute: But the *Statute of Westminster* 2. chap. 3. which gives *Cessavit* to the Heire for Cesser in time of his Ancestor, and that, that was Judged an unreasonable *Statute* in 33. Ed. 3. for that, that the Heire cannot have the arriages due in the time of his Father, according to the *Statute of Glocester*, and for that it shall be void: And also the Physicians of the Colledge, could not punish any by Fyne and also by Imprisonment, for no man ought to be twice punished for one offence, and the *Statute of 1. Marie* doth not give any power to them to commit for any offence which was no offence within the first

*Statutes*, and for that he ought not to be committed by the said *Statute of 1. Marie*: But admitting that they may commit, yet they have mistaken it, for they demand the whole hundred shillings, and one halfe of that belongs to the King: And also they ought to commit him forthwith, as well as Auditors, which have Authority by Parliament, to commit him which is found in arrearages: But if he do not commit him forthwith, they cannot commit him afterward, as it appeares by 27. H. 6. 9. So two Justices of the peace may view a force and make a Record of that, and commit the offenders to Prison, but this ought to be in *Flagranti Oriente*: And if he do not commit those immediately upon the view, he cannot commit them afterwards, and the Physicians have no Court, but if they have, yet they ought to make a Record of their commitment, for so was every Court of Justice: But they have not made any Record of that: And Auditors and Justices of Peace, ought to make Records, as it appeares by the Book of Entries: So that admitting that they may commit, yet they ought to do it forthwith, but in this case they cannot commit till the party shall be delivered by them, for this is against Law and Justice; and no Subject may do it, but till he be delivered by due course of Law, for the commitment is not absolute, but the cause of that is traversable, and for that ought to justify for speciall cause, for if the Bishop returns that he refuses a Clark, for that he is *Schismaticus, Inveteratus*, this is not good, but they ought to returne the particular matter: So that the Court may adjudge of that: Though it be a matter of Divinity and out of their Science, yet they by conference may be informed of it, and so of physick: And they cannot make any new Laws, but such only which are for the better government of the old; and also he said plainly, that it appeares by the *Statute of 1. Marie*: That the former *Statutes* shall not be taken by equity, for by these the President and Commons have power to commit a Delinquent to Prison, and this shall be intended, if they shall be taken by equity, that every Goaler ought to receive him which is so committed: But when it is provided by 1. *Marie*, specially that every Goaler shall receive such offenders: That by this appeares, that the former *statute* shall not be taken by equity: And so he concluded, that Judgement shall be entred for the Plaintiff, which was done accordingly.

Trinity 7. Jacobi, 1609. In the Common Bench.

Priviled. c.

**I**N Debt upon escape brought by John Guy an Attorney of the Common Bench, by an Attachment of priviledge against Sir George Reynell K<sup>t</sup>. Deputy Marshall of the Prison of the Kings Bench, the Defendant

Defendant pleads his priviledge, that is, that he was Deputy Marshall, and he ought not to be sued in other Court, then in the Kings Bench, according to the ancient Custome, and Jurisdiction of the sayd Court, upon which the Plaintiff demurred, and upon argument of both parties, it was adjudged that the Defendant should not have his Priviledge, and the principall reason was, for that the Plaintiff was an Attorney, and ought to have his priviledge in the Common Bench, and for that that this Court was first possessed of the Suit, it shall not be stayed, because of the Priviledge of the Defendant in another Court, see 9 Ed. 4. 53. the last case, where it is agreed, that one of the Courts may send *Superfedeas* to another, for there it is agreed that if an Accountant in the Exchequer be sued in the Common Bench, he shall send *Superfedeas* to them to surecase, and if he be sued in the Kings Bench, these of the Exchequer will shew the Record that he is accountable, for they cannot make *Superfedeas* to the King, and the Plea is there held *Coram Rege*, &c. And he shall be dismissed, for he may be sued in the Exchequer; and also to Ed. 4. 4. b. It appears that if one which hath cause to have priviledge in the Common Bench sue an Attachment, as our case is, against a Clark of the Kings Bench, such Writ shall not be allowed, for that that the Common Bench was first seised of the Plea, by their Plea, and the Priviledge of the common Bench is as ancient as the Priviledge of the Kings Bench, and one Court is as ancient as the other, for every of them is before time of memory, and it is by prescription.

Walmesley sayd, that the Possessory shall be preferred, *Quia melior est conditio possidentis*, but he agreed that if the priviledge of one Court be not so ancient as the other, then the most ancient shall be preferred, and it was agreed that though there be Difference in respect of parties, or though that the attendance of one be of more necessity then the other, as it was objected in this Case; that the Defendant ought to attend, otherwise he shall loose his office; so that it was answered, and resolved that the cause of the Suit in the Common Bench was voluntary, and the attendance of the Attorney or Clark more necessary, then of the Defendant, for hee may exercise his Office by a Deputy, but a Clark or an Attorney cannot, for their office is *Opus Laboris*, But the Office of the Defendant is only *Opus Labrum*, and he is to deal with *Gyves and Irons* and such like, so that in this Case the Office and place of a Clark or Attorney is to be preferred before the Office of Marshall, but admitting that one Inferiour Officer of the Common Bench, which is to have his priviledge sue a superiour Officer of the Kings Bench which is also to have his Priviledge there, this shall not make any



difference : And so was the opinion of all the Court, and upon this, Judgment was given that the Defendant should answer over.

Trinity 7. Jacobi 1609. in the Common Bench.

Assise.

View.

Coke.

Walmesley.

Challenge.

IN Assise between William Parson alias Chester Plaintiff, against Thomas Knight alias Rouge Cross tenant for the office of one of the Heraulds called Chester, the Recognitors of the Assise had view at a Funerall at Westminster, where the Officer ought to attend, and it was objected that this was no good view, for it was not in any place certain, where the Recognitors may put the Demandant in Possession, and the Disseisin was alleged to be at Westminster at the sayd Funerall, and it seems that the view was good, but admitting that it were not good. It seems to Coke cheit Justice, that the Assise in this case well lies without view, for the Office is universall, as the Office of the Clark of the Market, and an Assise for Tithes, and the Office of the Tennis Court, these are universall, and not annexed to any place, and for that an Assise well lies for them without view, but for an Office in the Common Bench, view may well be made in the Court, for the Court is alwaies held in a certain place, but for an Office in the Kings Bench, *Quere, Inquit Coke*, for this ought to follow the Court of the King by the Statute of *Articuli Cleri*, Chapter 3.

But Walmesley Justice, that this Court cannot be sitting in Clouds, but in some place or other, and for that the view ought to be here made, and then Coke sayd, by the same reason the Office of the Herauld cannot be exercised in the Clouds, but at Funerals, and by this the view ought to be made there also, but the Opinion of all the Court was, that the view was well made: the Tenant in Assise also challenged diverse of the Recognitors, for that they were of a former Jury upon the same question, and this was agreed to be a principall cause of challenge, but the Court would not allow of that without shewing the Record, but allowed that to be a cause of challenge for favour, and for that they were tryed by their Companions, being sworn to speak the Truth, and they were found to be indifferent, and for Seisin for the Demandant in the Assise, it was shewed that diverse Fees were due to the sayd Office, as seven pound for every day that he attended upon the Kings person, and for the Dubbing of every Knight, and that diverse of those Fees were received (and this office being litigious) were delivered to be detained in *Deposito*, and to be delivered to him which was Officer, and the plaintiff brought an Action by the name of Chester as Officer and recovered those Fees, and this was resolved good Seisin, and also that Seisin after the grant of the Office, and before the investing of the

the Patentee by the Marshall was good, for the Investing was but a ceremony, it was also resolved that where an office extends to all the parts of *England*, and that here an *Assise* doth not lie in any County, though that the dissein were made in one County, but the *Assise* be brought for the profit of the office in one County and not for the office it selfe; 43. *Ed. 3. Feoffments and Deeds*: That by Grant of the profits of a Mill and Livery, the Mill it selfe passes, so that taking of the profits is dissein of the office, also it was objected that the Demandant was no officer, for though that he hath a Patent of it, yet he was not Invested nor Installed in the office, which appeares to the Marshall, and for that he was no Officer, and so hath no cause to have Action: And that this is an office which is incident and annexed to the office of Earle Marshall, and though that he be not Earle Marshall, yet there are Commissioners have his power and authority, and for that the Investing and Instalment of the Plaintiff in the said office appeares to the said Commissioners; but it was resolved cleerely by all the Justices, that the Demandant was Officer by the Kings Grant, without any Installation or Investing, and that this without that, all the Fees and Profits of the office appertayning to him, and that the Investing and Installation, was but a ceremony, in the same manner as if the King hath a *Donative*, and gives that to another, the Donee shall be in actuall possession by the gift, without any Induction or other ceremony: But admitting that the office were annexed to the office of Earle Marshall, then it was agreed that the Commissioners cannot give it, as the cheife Justice of the Common Bench hath divers offices appertaining to his place, and he may dispose of them; But if he die, the King in time of vacancy, nor the most ancient Judges cannot give or dispose of any of them being void, as it appeares by *Serrogates Case*, *Eliz. Dyer*: And so the cheife Justice is made, and allwaies hath been made by Patent, and so are the other Justices, and for that they cannot be made by Commissioners, and so the cheife Justice of *England*, hath all times been made by Writ, and for that cannot be made by Patent, nor by Commission: And so in the case at the Burr, though that the Commissioners have the power and authority of the Earle Marshall, yet they are not Earle Marshall, it was also objected that the Fees were not due to the Plaintiff, for that he did not attend: But to that it was answered and resolved, that the Fees were due to the office, and for that non-attendance of the office, was no forfeiture of the Fees: And upon these resolutions the Recognitors found for the Demandant, according to the direction of the Court.

Trinity 7. Jacobi, 1609. In the Kings Bench.

Godfall.

Error in a  
Fine.

**G**ODS ALL and his Wife: The Proclamations of the Fyne were well and duly entred in the Originall remaining with the Chirographer: But in the Transcript with the *Cuslos brevium* was error, and it seemeth that this notwithstanding the Fyne was good, but the Transcript was amended.

Trinity 7. Jacobi, 1609. In the Kings Bench

The Town of Barwicke.

Barwick.  
Returne of  
Writs.

**T**HE King which now is, by his *Letters Patents*, Incorporated the Mayor, Bayliffs, and Burgessees of *Barwicke*, and granted to them the execution of the Returne of all Writs: And after a Writ of *Extendi facias* was directed to them, and they made no returne of that, and upon this was the question, if that shall be executed by them, or by the Sheriff of *Northumberland*: And it seemed to *Nicholls* Serjeant, that argued for the Plaintiff in the extent that desired execution and the returne of that, that they ought to make execution and returne, for it seemeth to him that this was English, and that this appeares by the Act of Parliament, by which the Incorporation was confirmed, and so it appeares also by the *Letters Patents* of the King, by which the Incorporation is made, for if it were not English, neither the *Letters Patents* nor the Act of Parliament are sufficient to make Incorporation of that, and also they certified Burgessees to the Parliament of *England*: And the Kings Bench sent *Habeas Corpus* to it, and for the not returne of that inflicted a Fyne upon the Corporation: See 21. *Ed.* 3. 49, and 1. *Ed.* 4, 10. But *Hutton* Serjeant seemed to the contrary, and that they ought not to make execution, for he said it is a part of *Scotland*, and not part of *England*, and it was conquered from that, and it was a *Sherifwicke*, and hath the same privileges of ancient times, which they now have by their new Grant: See 24 *Ed.* 1. and 2. *Ed.* 2. Obligation, &c. That one Obligation dated there shall not be tryed in *England*, and also that it is not within the County of *Northumberland*, nor part of it, nor the Sheriff of *Northumberland* cannot meddle in it, see 2. *H.* 7. 31. 26. *H.* 6. 23. and it is adjourned.

Idemplitas no-  
minis.

It seemes that *Jacob* and *James* are all one name, for *Jacobus* is-  
Latine

Latine for them both, but *Walmesley* conceived that if he be Christened *Jacob*, otherwise it is, as if one be Christened *Jacob*, and another *James*, then they are not one selfe same name.

Note that *Coke* cheife Justices said, that if Commissioners by force of *Dedimus potestatem*, take a Fine of an Infant, that they are Fynable and ransomable to the value of their Lands, and that this shall be sued in the Star-chamber.

Fine.  
Infant,

Trinity 7. Jacobi, 1609 In the Common Bench.

Robinson.

**R**obinsons Case: A man devises Lands to his Wife for life, the remainder to his Son, and if his Son dies without Issue, not having a Son, that then it should remaine over, and it seemed that this it a good Estate tayl, and it was adjudged accordingly.

Tayle.

If a man makes a Lease for three yeares, or such a small Tearme, to his Son or Servant to try an *Ejectione Firme*, or if it be made to another Inferior by a Superior, which cannot countenance the Suit, it shall not be intended Maintenance, nor buying of Tytles, which shall be punished.

Maintenance.

Trinity 7 Jacobi 1609. In the Common Bench.

**N**O: e, an Attorney of the Common Bench was cited before the High Commission and committed to the Fleet, for that he would not swear upon Articles by the Commissioners ministred, and *Habeas Corpus* was awarded to deliver him, and a Prohibition to the Court of high Commission, see 1. and 2. Eliz. *Scroggs* case 175 b. *Dyer*, and there in *Margery Hynds* case, who 18 Eliz. *Noluit iurare coram Justiciarijs Ecclesiasticis super articulos pro usura*, and *Leyes* case 9. and 10. Eliz. *Michaelmas Rot.* 1596. and it is written in the Book of the Lord *Dyer* but not printed, the case was, *Ley* being an Attorney of the Common Bench was committed to the Fleet, by the Bishop of London and two others of the high Commissioners Ecclesiasticall, for that that he was present at a Masse, and he refused to be examined upon his oath upon Articles administred by the high Commissioners, see also 5 *Edw.* 4. *Keyfers* case upon the statute of 2 H. 4. chap. 14. Which gives authority to the Arch-Bishop to imprison, &c. And see the Register fol. 36. b. The form of an Attachment against the Bishop, which cited *Aliquos Laicos, ad aliquas cognitiones faciendas*,

*Habeas Corpus.*  
*Prohibition.*

*faciendas, vel ſacramentum preſtandos niſi in caſibus matrimonialibus & Teſtamentarijs, &c.* But it was urged that the Judges of the Common Law, ſhall not have the expoſition of the ſtatute of 1. Eliz. becauſe it was an Eccleſiaſtical Law, but it was reſolved by all the Juſtices, that it belongeth to the Judges of the Common Law to expound this, for the Statute was temporall meerly, and with this 4 Ed. 4. 37. b. c. upon the Statute of 5 H. 5. chap. Which provides, *Quod libellus ſit deliberatus parti in caſu, ubi per legem deliberandus eſt, & hoc ſine difficultate*, And though that this Act be meer ſpirituall, yet the Expoſition of that lyes open to the common Law.

Michaelmas 7. Jacobi 1609. In the Common Bench.

### Eſtcourt and Harrington

Treſpaſſe for  
Slander.

Party Jury of  
two Counties.

**I**N Treſpaſs upon the Caſe between George Eſtcourt Plaintiff, and Sir James Harrington Knight Defendant, for that, that the Defendant ſayd that the Plaintiff was a forſworn and perjured man, which the Defendant juſtified, for that that the Plaintiff exhibited and Engliſh Bill, in the Marches of Wales, before the Preſident and Councell there, and in the ſame ſuit made an Affidavit, upon which an Injunction was granted for the poſſeſſion of Land in queſtion between them, for the ſayd Plaintiff, and that the ſayd Affidavit was falſe, and the Plaintiff hath committed perjury in that, and this was allowed good Juſtification, the Jury was of the Counties of Gloceſter and Salop, and the words of the *Diſtringas* were ordinary till towards the end, and that was *Ad faciendam quendam Juratum ſimul cum alijs Juratoribus comitatus noſtri Salop*, and this was the *Diſtringas* directed to the Sheriff of Gloceſter, and ſo *Mutatis mutandis* in the *Diſtringas* directed to the Sheriff of Salop; and note that the Jurors were ſworn one of one County and another of another County, *Alternis vicibus*, and 24. were returned of every County.

Michaelmas 7. Jacobi 1609. In the Common Bench.

### Simpſon and Waters.

Action upon the  
Caſe for Slander.

**S**Impſon againſt Waters in an Action of Treſpaſſe upon the caſe for Slander, that is, thou art drunk, and I never held up my hand at the Barr, as thou haſt done, and agreed that an Action doth not lye for theſe Words, for peradventure he intended buttery Barr, And by Foſter Juſtice, if he had ſayd for Felony, that the Action doth



doth not lye, for many honest men are arraigned, but if he saith he was detected Action doth not lye, but if he saith he was convicted for Perjury Action lyeth as seemed to him.

In Trespass the Originall bore *Teste 3. January 6. Jacobi* and in the Count the Trespass is supposed *20 January 6. Jacobi*, which is after the *Teste* of the Originall, and agreed that this shall not be aided by the *Statute* of Jeofailes, but if it were originall otherwise it is. Error.

Michaelmas 7. Jacobi 1609. In the Common Bench,

Hare and Savill.

IN Covenant by *John Hare and Hugh Hare against John Savill*, the Plaintiffs made a Lease for years to the Defendant, rendring Rent at two Feasts, or within ten dayes after every of those, at the *Temple Church*, and the Defendant covenanted to pay the Rent according to the reservation, and for the non payment these Plaintiffs brought an Action of Covenant, to which the Defendant pleads levied by distress, and upon this the Plaintiffs demurred, and adjudged with the Plaintiffs accordingly, for that the Defendant for his Plea, hath confessed that it was not payd according to the reservation, for the Plaintiffs cannot distrain, if it were not behind after the day, and it was agreed, that where a Rent is reserved to be payd at such a Feast or within twenty dayes, that the Lessee in this case shall have Election if he will pay that at the Feast; or at the end of twenty dayes, for he is the first Actor, and the Lessor cannot distrain nor have action of Debt, till the twenty dayes be past, and it was agreed, that the Covenant shall not alter the nature of the Rent, but that nothing behind, or payment at the day, were good Pleas.

Covenant for Rent.

Defendant in Debt pleads to the Law, and was ready at the Barr to wage his Law; and it was resolved by the Judges upon conference with the Prothonotaries that it might be continued, but the Court would advise.

Continuance.

IN Action upon the Case upon *Assumpsit*, the Plaintiff counts, that diverse Goods were delivered to him in pawn, and that in consideration that he should deliver them to the Defendant, the Defendant assumed and promised to pay to him the Debt for which the Goods were pawned, and it was objected that the Count was not good, for that it doth not contain the certainty of the Goods which were pawned; and delivered to the Defendant, but to that this difference was agreed, that when Goods are to be recovered and Dam-

Assumpsit.  
Consideration.

gages for them; and are in demand, the certainty of the goods ought to appeare in particuler, as if a man pleades, that he was never Executor, nor administred as Executor, it is a good Plea, for the Plaintiff that he administred *Diversa bona* in such a place, so if he plead that he hath *Diversa bona nabilia* in other Diocesse, it is good in both cases without shewing what goods in certaine, see 11. H. 7. 29. Ed. 3. Also it was objected that the consideration was not sufficient, and then it shall be *Nudum pactum ex quo non oritur actio*, for the Plaintiff hath not any Interest in the Goods, and they were delivered him to keep, and not to deliver over, so that the delivery was vitious, and for that it shall be no good consideration, and of this opinion was *Foster* Justice: But *Coke*, *Wraburton*, *Danyell*, and *Walmesley* being absent, it seemes that the condition was good, as if a man in consideration that another will go to *Westminster*, or cure such a poor man, or marry a poore Virgin, assume to pay to him a sum of money: And though this consideration were not valuable, yet it seemes good: And he that pawned hath a property in the goods, and may have them againe.

Debt against  
Executors.

In debt against three Executors, two of them are out lawed, and the third pleads and Verdict against him, and it was resolved that the Judgement shall be against all by the *Statute* of 9. Ed. 3. for they all are but one Executor, and the Cost shall be against him which pleades, if the others confesse or suffer Judgement by default: And there shall be but one Judgement and not diverse, see 17 Ed. 3. 45. b. 11 H. 6.

Error.  
Vc. fa. & hab.  
Carpus.

Upon a *Venire Facias* awarded, the Sheriff returnes but 21. and the *Habeas Corpora* was against 21. only, and this was also returned, and upon that ten appeared, and upon this *Tales* was awarded, and triall had, and but ten of the principall Pannell sworne: And this was Error, but if twelve of the principall Pannell had appeared and served, it seemes that it shall not be error, for so it was resolved in *Gradners* case, where twenty three were returned, but twelve appeared and tryed the Issue, and this was resolved to be good and no error.

*Michaelmasse 7, Jacobi, 1609. In the common Bench.*

Buckmer against Sawyer.

Executon in  
Remainder.

A Man seised of Land in *Galvelkind* hath Issue three Daughters, that is, *A. B.* and *C.* deviseth all his Land to *A.* in tayl, the remainder of one halfe to *B.* in tayl, the remainder of the other halfe to *C.* in tayl, and if *B.* died without Issue, the remainder of her

her Moytie to C. and her Heires, and if C. died without Issue, the remainder of her Moytie to B. and her Heires, the Devisor dies A. and B. dies: And the question was, if C. shall have a *Formedon* in remainder only, or severall *Formedons* for this Land: And it seemed to all the Justices, that one *Formedon* lieth well for all, for that, that it was by one selfe same conveyance, though that the Estate come by severall deaths, and this Action was to be brought by the Heire of C. after the death of C. See the three and four *Phil.* and *Mary Dyer.*

Note that after appearance of a Jury, and after that divers of them were sworn, others were challenged, so that it could not be taken by reason of default of Jurors: But a new *Distingas* awarded, and at the day of the returne of that, these which were sworn before appeared, and then were challenged: But no challenge shall be allowed, for that, that they were sworn before, if it be not of after time to the first appearance.

Challenge.

*Michaelmasse 7. Jacobi, 1609: In the Common Bench.*

Baylie against Sir Henry Clare

Partition.

**BAYLIE** against Sir Henry Clare, the Writ was of two parts, without saying in three parts to be divided: And it seemed to *Nicholls* Serjeant which moved this, that it was not good, but error: But the opinion of the Court was that it was good: See 17. *Ed.* 3. 44. 19. *Ed.* 3. *breffe* 244. 17. *Affise* with this difference, that if there are but three parts and two are demanded, there it is good without saying in three parts to be divided, for when parts are demanded it is intended, all the parts but one, and that it is only one which remaines, see the Register fol. 16. 12. *Affise*: And it was adjudged in the Kings Bench in the case of one *Jordan*, that demand of two parts where there are but three parts is good, see 39. *H. 6. Salford* against *Hurlston* in *Formedon* which demanded two parts where there is but three, and so of three parts where there is but four, it is good without saying, in three or four parts, to be divided: But if a man grant his part, this shall be intended the halfe, for *Appellatio partis dimidium partis continetur*, and a Writ of Covenant ought to be of two parts without saying in three parts to be divided, for so is the forme, and if in such case in three parts to be divided be incerted, the Writ shall abate, see *Thelwell* in his digest of Writs, 146. and by *Coke* if a man bring *Ejectione Firme* for ten Acres, and by evidence it appeares that he hath but the halfe *Ex vigore Juris* it shall not be good, but he said he would submit his opinion,

to the Judgement of ancient Judges of the Law which have often time used the contrary.

*Dures.*

Note that the Husband may avoid his Deed, that he hath Sealed by the duresse of Imprisonment of his Wife or Son: But not of his Servant, and so Mayor and Commonalty may avoid a Deed sealed by duresse of Imprisonment of the Mayor, for it is Idemptrity of person, between the Husband and the Wife: See 21. *Ed. 4.* and 7. *Ed. 4.* A man may avoid Seilin for payment of Rent by coercion of distresse but not his Deed.

*Michaelmasse 7. Jacobi, 1609. In the Common Bench.*

*Payn and Mutton.*

*Action upon  
the case for  
slander.*

**I**N an Action upon the case by *Payne* against *Mutton*, the Plaintiff counts that the Defendant called him Sorcerer and Inchantor: And agreed by all the Justices that Action doth not lie, for Sorcerer and Inchantor are those which deale with charmes, or turning of Bookes, as *Virgill* saith, *Carminibus Circes socios mutavit ulfiss*, which is intended Charmes and Inchantments, and Conjuratation is of *Con et nico*, that is to compell the Divell to appeare, as it seemes to them against his will, but which is that to which the Devill appeares voluntarily and that is a more greater offence then Sorcery or Inchantment, which was adjudged that Action doth not lie for calling a man Witch, and said that he bewitched his Weare that he could not take any Fishes: *Dodridge* the Kings Serjeant saith that an Action lieth for calling a woman, gouty pockye Whore, and said that the Pox had eaten the bottome of her Belly out, and so it was adjudged that it lieth well for these words, get thee home to thy pokey Wife the Pox hath eaten off her Nose: But for the Pox generally Action doth not lie: But if he saith that he was laid of the Pox, then Action well lieth, for then it shall be intended the great Pox.

*Prohibition.*

Note that in Prohibition and *Replevin*, the Defendant may have *nisi prius* by *Proviso* without default of the Defendant, for he himselfe is *re vera* Defendant, and there are two Actors, that is the Plaintiff and Defendant: But the Court appointed that Presidents should be searched, the Plaintiff is not bound to prosecute *Cum Effectum* in this Court, as he is in the Kings Bench: And it was agreed that the manner of Pleading was agreement, as for *Retorno Habendo*, in the *Replevin* and *Pro consultatione habenda* in the Prohibition.

*Michaelmasse*

Michaelmas 7. Jacobi, 1609. In the Common Bench

Miller and Francis.

**M**YLLER Plaintiff in Replevin against *Thomas Francis*, the will. case was, *Richard Francis* was seised of Land held in Socage, and deviseth that to *John* his eldest Son for a hundred yeares, the Remainder to *Thomas* his second Sonn for his life, and made his four other youngest Sonns his Executors, and after made a Feoffment to the sayd uses, the Remainder to the sayd *John* his eldest Son in tayl; *Proviso* that if the sayd *John* disturbed the Executors of taking his Goods in his House, that then the sayd use and uses limited to the sayd *John Francis* and his Heires shall cease, and after declared that his intent was, that in all other points his Will should be in his force, and it was pleaded that *John* did not suffer the sayd Executors to take the sayd Goods in the sayd House, and if his Estate for years, or in Tayl, or Fee-simple shall cease was the question, and it seemed to the Judges that the Condition shall not be Idle; but shall have his operation, as it appears by *Hill and Granges case* and the *Lord Burkleys Case* in the Comment. and the *Lord Cheneys Case*, *Coke*, And it seems also, that it shall not be referred to Estate in Fee-simple, for then it shall be void, and it shall not be referred to a Term, for it is limited to an Estate limited to the said *John* and his Heires, but it seemeth it shall be referred to an Estate tayl only, as it is 2 and 3. P. and *Mary Dyer* 127. 55. 11 H. 7. 6. But the case was adjudged upon one point in the Pleading, for it was not pleaded that *John Francis* had notice of the Devise, nor that he had made any actuall disturbance, and peradventure he entered as Heir and had no notice of the Condition, and when the Executors came to demand the Goods which were belonging to the Heir, and annexed to the House, and he sayd that it doth not appear to them to prove that an exprefs notice was given in this case, the Books of 43 *Assise* where a man was attaint and after was restored by Parliament, and a Writ being directed to the Escheator, the Escheator returns, that he was disturbed, and upon *Scire facias* the disturber pleads, that he had no notice of the sayd act of restitution, and for this he was excused of Disturbance: And see 35. H. 6. Barr, 162.

Michaelmas



Michaelmas 7. Jacobi, 1609. *In the Common Bench.*

Waggoner against Fish.

Priviledge.  
Postea 218.

**W**AGGONER brought a Writ of Priviledge, supposing that he had a suit depending here in the Common Bench, which was directed to the Maior and Sheriffs of London, and upon the return it appears, that 4. Jacobi an Act of Common Councell was made that none should be retyler of any Goods within the same City, upon a certain pain, and that the Chamberlain of the said City for the time being, may sue for the said penalty to the use of the sayd City, at any of the Courts within the said City, and that the Defendant hath retailed Candles, and held a shop within the sayd City being a stranger, and against the sayd Act, and for the sayd penalty, the Chamberlain hath brought an Action of Debt within the sayd City, according to the sayd Act of Common Councell, and upon the return it appeares, that by their Custome the Maior and Aldermen with the Assent of the Commoners of the said City, may make By-Laws for the Government of the sayd City, and that the sayd custome, and all other their Customes, were confirmed by Act of Parliament, and upon this it seems, that though there be not remedy given, for this penalty in another place then in London, that yet if it be against Law he shall not be remanded, and if a Corporation hath power to make By-Laws, that shall be intended for the Government of their ancient Customes only, and not to make new Lawes, see 2 Ed. 3 *John De Brittons Case*, but it seems if this By-Law be for the Benefit of the Common-Wealth, that it shall be good, otherwise not, and it was Adjourned, see *Hillary* next ensuing, for then it was adjudged, that he shall not be remanded, see afterward *Michaelmas 7. Jacobi*, It was adjudged.

Adjournment  
of Tearme

**N**Ote that this Tearme was adjourned untill the Moneth of *Michaelmas* by reason of the Plague, and upon the adjournment this ensued, and was moved by *Telverton* and *Crook* at the Bar, and the Case was this.

Michaelmas 7. Jacobi, 1609. *In the Common Bench.*

Infant levies  
Fine brings  
Errorr

**P**OYNES being an Infant levies a Fine, and in *Trinity* Tearme last past brought his writ of Errour in the Kings Bench, and assigned for Errour, that at the time of the Fine levied was, and yet is within age, and prayed that he be inspected, and insomuch that he had

not

not his proofs there, he was not inspected but *Dies datus est usque Octabis Michaelis Proximas*, at which time came the said *Paynes* the day which was wont to be the day of the *Essoyn*, and prayed Justice *Crooke* (which was there to adjourn the *Term*) to inspect him; and to take his proofs, who did inspect him accordingly, *De bene esse*, and now before the Moneth of *Michaelmas* the Infant came of full age, and if this inspection were well taken, and what authority the Judge had upon that day to adjourn, was the question.

And *Flemming* cheife Justice sayd, that the day of *Essoyn* is a day in *Term*, and that the Court was full though there was but one Judge, and if the inspection had been the day of the *Essoyn*, and before the fourth of the *Post*, he had come of full age, this shall be very good, but the doubt rose as the case is, if upon the day of *Adjournment* the Judge had power to do anything but to adjourn the *Term*, and for that it was appointed to be argued, and for the Argument of that, *Quere* of my Author *Lane*.

Michaelmas 7. Iacobi 1609 In the Common Bench.

Rivet Plaintiff, Downe Defendant.

**I**N an action upon the case upon an *Assumpsit*, the case appears to be this, Copy-holder makes a lease for a year according to the custome of the Mannor the Lord distrains the Farmer of the Copy-holder for his Rent, and the Copy-holder having notice of that, comes to the Lord, and assumes that in consideration, that the Lord should relinquish his Suit against his Farmer, touching the same distress he would pay the Rent by such a day, the Lord delivers the Distress, and for default of payment at the day, brings an Action upon the case, and upon *Non Assumpsit* pleaded, Verdict passed for the Plaintiff: And *Barker* Serjeant came and moved in arrest of Judgment.

First that a man cannot distrayn a Copy-holder but he ought to seise, but *Williams* Justice and others to the contrary, and by him if a man makes a Lease at will Rendring Rent, he may distrain for this Rent, 9 H. 7. 3. The case of Rescous.

Secondly, He moved that when the Lord distraines, that now the Tenant hath cause of Action, that is *Replevin*, and for that it cannot be sayd *Setam suam*, and so the consideration failes, but all the Court against that, and that this was a good consideration, and by *Flemming* cheife Justice, Distress is an Action in it self, because this is the cause of a *Replevin*, and when the Tenant brings his *Replevin* and the Lord avowes, now is the Lord an Actor, and so it is *seta sua*.

*sua*, and by him *setta* is not only an Action hanging, but that which is cause of an Action, And Judgement was given for the Plaintiff.

Action upon the  
Case.

*Michaelmasse 7. Jacobi, 1609. In the common Bench.*

Flemming and Jales.

Action upon the  
Case.

**A**CTIONE upon the Case for these words: Thou hast stolen my Goods, and I will have thy neck, and maintainable.

*Michaelmasse 7. Jacobi 1609. In the Common Bench.*

Ayres Case.

**A**CTION upon the Case for these words; *Ayer* is an arrant Theife, and hath stolen divers Apple Trees out of *J. S.* Garden, and the Action well maintainable, otherwise if he had said, for he hath stolen, &c. for then it should not be Felony to steale Trees, and the word (For) shewes the reason why he called him Theife, but the word (And) not.

*Michaelmasse 7. Jacobi, 1609. In the Common Bench.*

Bryan Chamberlaines Case against Goldsmith.

Debt for Obligation.

Hutton.

**I**N Debt upon an Obligation, in which the under Sheriff was bound to the Sheriff, for the performing of diverse Covenants contained in an Indenture made between them for the exercising of the said Office, and the Plaintiff assigned breach of Covenant, by which the under Sheriff hath Covenanted, that he would not execute any proceffe of execution without speciall warrant and assent of the Sheriff himselfe: And the sole question was, if this Covenant be a good and lawfull Covenant or not, and it was argued by *Hutton* Serjeant for the Defendant, that counted that the Sheriff is a publick Officer, and may execute the office by himselfe, yet when he hath made an under Sheriff, he hath absolute authority also, and it is not like to private authority, but it is as if a man make an Executor, provided that he shall not administer, his debts above the value of forty pound: And as if an Obligation with Condition, that if an Obligor shall keep the Oblige without damages for four Beefes taken in *Withernam*, that the Obligation shall be void, or as if a man takes an Obligation of his Prentise, with Condition that he shal not use his Trade within  
five

five yeares, or within ten miles of such a place, or as a Steward takes an Obligation of another man with Condition that he shall not sue in other place but where he is Steward, or in the Common Bench, this abridges the subject of his right, and that the under Sheriff is a publick officer and mentioned in many *Statutes*, though he shall not be an Attorney the same yeare in which he is under Sheriff: And the *Statute of 23. H. 8.* restraines the under Sheriff, that he shall not let any prisoners to Bayl, but in the same manner as is contained in the *Statute*, and further he said, that all Obligations which have Impossible conditions are good, and the Condition void, but if the Condition be against Law, the Obligation and Condition also is void: And so he concluded that the under Sheriff is a publick Officer, and that his office cannot be apportioned, and that the Condition was performing of a Covenant which was against Law and void, and so by consequence the Obligation void: And so praied Judgement for the Defendant: And for the Plaintiff it was argued by *Dodridge* Serjeant of the King, that the Obligation is good and not void: And he said that there are two Officers to all the Courts of the King, which are to execute all Writs, and that these Officers are Sheriff and Bishop, and the Law doth not take any notice of under Sheriff, or Warden of spiritualities, for the Sheriff himselfe shall be amerced and not the under Sheriff, which is but his substitute, and it appears by *3. H. 7.2. b.* That all Writs shall be directed to the Coroner, and by him ought to be executed, and *10. H. 4. 42.* The Sheriff was merced for an Arrest made by a Bayliff of a franchise, and and though that the Warden of *Westminster* Hall is an Officer to the Kings Courts to some purpose, yet no Writ shall be directed to him, as it appears by *8 Ed. 4. 6.* Also he agreed that the power of the Sheriff is double, that is Ministeriall and Juditiall, and some times he executes both together, as in *Redisseisin*, for of that he is Judge and also is Minister to the Court of the King, and yet he is but one man, for the Law doth not take any notice of under Sheriff, nor intends, that he shall supply any of these Offices, for the under Sheriff is but servant to the Sheriff, and to execute his Ministeriall power only, and if it be so, he may limit his Authority at his pleasure: And if the Sheriff make a false returne, or otherwise retard, or make an uncertain returne, he himselfe shall be punished by Action, for the Law requires knowledge and intelligence of the Sheriff, and the ancient *Statutes* made in the old time, make mention of Sergeants at Mace, and yet they make not any mention of under Sheriff, which is but servant.

And he agreed that an Obligation taken with Condition against Law is void, but he said that this is not against Law, for the under

Sheriff is a person of whom the Court doth not take any notice, for he is but servant of the Sheriff, and for this case, and removable at his pleasure, and he may exercise his office by himselfe when he pleases, and also he argued that the authority which may be totally countermanded, may be countermanded in part, and that the under Sheriff hath *Derivata potestas, qua semper talis est qualis committitur*: And by 35. H. 6. A man may make two Executors, one for his Goods in *Middlesex*, and the other to administer the Goods in *London*, and this is good between them: But not against a stranger, for he ought to sue them both, and he shall not be prejudiced by that, and so 32. H. 8. *Brook* Executor, 155. A man made two Executors *Proviso* that one should not administer in the life of the other, and 36. H. 8. 61. Feoffment and Letter of Attorney to make Livery to three or to any of them, Livery cannot be made to two, and also he said that there is no difference between power derived from a private person, and power derived from the publick, when this power comes to execution: And admitting that the Sheriff may limit the authority of his under Sheriff for a time, as it seemes that he may, then of this it followes, that he may allwaies abridge and apportion his authority: And he agreed that when an under Sheriff is made, diverse *Statutes* have been made to punish him if he offend: But the Sheriff is not compellable to make under Sheriff: And as to the Obligation, that if an execution be delivered to the under Sheriff, against one which is in his presence, that he ought to execute it, he saith that the Law is not so, for the party ought to deliver the execution to the Sheriff himselfe, for it doth not appeare that he hath an under Sheriff: if he have received a Writ of discharge or not: And also the Office of the Sheriff is of charge to the King and to the Common Wealth, and the execution of Writs may be prejudicall and penall to the Sheriff himselfe: And for that he may well provide, that he shall have notice of every execution which are most Penall: And also in all the Indenture now made, he doth not constitute him to be his under Sheriff, but only for to execute the Office, and for these reasons he seemed the Obligation is good, and demands Judgement for the Plaintiff: But it seemes to all the Court, that the Covenant is void, and so by consequence the Obligation, as to the performance of that void, but good to the performance of all other Covenants: And *Coke* cheif Justice said, that the Sheriff at the Common Law was eligible as the Coronor is, and then by the death of the King his Office was not determined, and also it is an intire Office, and though the King may countermand his Grant of that, intirely, yet he cannot that countermand by parcells, and also that the under Sheriff hath Office which is intire,  
and

Conv.



and cannot be granted by parcells, and this Covenant will be a meanes to nourish bribery and extortion, for the Sheriff himselfe shall have all the benefit, and the under Sheriff all the payn, for he is visible, the under Sheriff and all the Subjects of the King will repaire to him, and the private contracts between the Sheriff and him are invisible, of which none can have knowledge but themselves.

And Warburton sayd; that in debt upon escape, &c. are against the Sheriff of *Nottingham*, he pleaded *Nihil debet*, and gives in evidence, that the Bayliff which made the Arrest, was made upon condition, that he should not meddle with such executions, without speciall warrant of the Sheriff himselfe, and his consent, (but it was resolved (this notwithstanding) that the Sheriff shall be charged in: and in the principall case, Judgement was given accordingly, that is, that the Covenant is void

Note that the Sheriff of the County of *Barkes*, was committed to the *Fleete*, for taking twenty shillings for making of a warrant upon a generall *Capias utlagatum*, for all the Justices were of opinion, that the Sheriff shall not take any Fees for making of a warrant or execution of that Writ, but only twenty shillings and foure pence, the which is given by the *Statute of 23. H. 6.* for it is at the Suit of the King: But upon *Capias utlagatum unde convictus est*, which is after Judgement, it seemes it is otherwise.

Sheriff committed to the Fleet.

A man grants a Rent to one for his life, and halfe a yeare after to be paid at the Feasts of the Anunciation of our Lady, and *Michael the Archangell* by equall portions, and Covenants with the Grantee, for the payment of that accordingly; the Grantee dies 2. *Februarij*, and for twenty pound which was a moyity of the Rent, and to be payd at the anunciation after, the Executors of the Grantee brings an Action of Covenant, and it seems it is well maintainable. And *Coke* cheife Justice sayd, That if a man grants Rent for anothers life, the Remainder to the Executors of the Grantee, and Covenant to pay the Rent during the Tearm aforesayd, this is good *Collective*, and shall serve for both the Estates, and if the Grantee of the Rent, grant to the Tenant of the Land the Rent, and that he should distrain for the sayd Rent, this shall not be intended the same rent which is extinct, but so much in quantity, and agreed that when a Rent is granted, and by the same Deed the Grantor covenants to pay that, the Grantee may have annuity or Writ of Covenant at his Election.

Grant of a Rent.

Michaelmas 7. Jacobi, 1610. In the Common Bench.

Waggoner against Fish; Chamberlain of London.

Privilege of  
London.

**JAMES Waggoner** was arrested in London, upon a Plaint entered in the Court of the Maior in Debt, at the suit of *Cornelius Fish* Chamberlain of the sayd City, and the Defendant brought a Writ of Privilege; returnable here in the Common Pleas, and upon the return it appears, that in the City of London there is a custome, that no forrainer shal keep any shop, nor use any Trade in London, and also there is another Custome, that the Maior, Aldermen, and Commonalty (if any custome be defective) may supply remedy for that, and if any new thing happen, that they may provide apt remedy for that, so if it be *congrua & bone fidei consuetudo rationi consentie & pro communitate Regis, civium & omnium aliorum ibidem confluentium*, and by Act of Parliament made 7 R. 2. All their customes were confirmed; and 8 Ed. 3. The King by his Letters Patents granted that they might make By-Laws, and that these Letters Patents were also confirmed by Act of Parliament, and for the usage certified, that in 3 Ed. 4, and 17. H. 8. were severall acts of Common Council, made for inhibiting Forrayners to hold any open shop, or shops or Lettice, and penalty imposed for that, and that after, and shewed, the day in certain was an Act of Common counsell, made by the Mayor, Aldermen, and Commonalty: And for that it was enacted, that no Forrayner should use any Trade, Mistry or occupation, within the said City, nor keep any Shop there for retayling, upon payn of five pound, and gives power to the Chamberlain of London for the time being to sue for that by Action, &c. in the Court of the Mayor, in which no Essoyn nor wager of Law shall be allowed, and the said penalty shall be the one halfe to the use of the said Chamberlain, and the other half to the poor of Saint Bartholomewes Hospitall: And that the Defendant held a shop and used the Mistry of making of candles the seventh day of October last, and for that the Plaintiff the ninth day of the same month then next ensuing, levied the said plaint: And upon this the Defendant was Arrested, and this was the cause of the taking and detaining, &c. And upon argument at the Bar by Serjeant Harris the younger for the Defendant, and Hutton for the Plaintiff, and upon sollemne arguments by all the Justices; Coke, Walmesley, Warburton, Danyell, and Foster, it was agreed: That the Defendant shall be delivered, and not remanded

Harris.

Hutton.

manded : And the case was devided in to five parts.

The first the custome.

Secondly, the confirmation of that by Act of Parliament.

Thirdly, the grant of the King, and the confirmation of that by Act of Parliament.

Fourthly, the usage and making of Acts of common councell according to this.

Fiftly, the Act of common councell upon which the Action is brought, and upon which the Defendant was Arrested.

And to the first, which is the custome, it was also said, that this consists upon three parts :

That is, first if any custome be difficult.

Secondly, if it be defective.

Thirdly, if *Aliquid de novo emergit*, The Mayor, Aldermen, and Commonalty : *Possunt opponere remedium*, and that there are foure incidents to that remedy.

First it ought to be *Congruum Retione*.

Secondly, *One fidei consonum*.

Thirdly, *consentaneum rationi*.

Fourthly, *Pro communi utilitate regis, civium & comodam aliorum ibidem consuetudinum* : But all the question was upon the remedy, for it was agreed that the custome shall be good : But it was doubted by *Fesser and Danyell* that there was no good returne, for it was but as recyted ; and it was not averred and positively said, that there was such a custome, and to prove that the case of 28 H. 6. was cited, where in debt upon an Obligation, the Defendant demands *Oyer*, and upon the view saith, that it appeares by the said Obligation, that two others were joyntly bound with him not named, Judgement of the Writ, and 24. Ed. 4. Where it was pleaded, as it appeares by the *Letters Patents* of one King, and in 11. H. 4. in returne of a Sheriff: But *Coke* answered and took a difference between returne upon a Writ of privilege, and upon which no Issue may be joyned, nor demurrer, and that it is but for an Informer of the Court, and other pleads : And for this it seemes to him, that it is good as to that, and he conceived that by the Grant of the King the custome is destroyed, for the King by his Grant cannot add nor diminish any thing of the custome, no more then of Prescription, and exceptance of Grant shall be extinguishment of one as well as of the other, as it appeares by 8. H. 4. 25. H. 7. 5. 38. H. 8. B. Prescription, 7 R. 2. But to this the Lord *Coke* gave no answer, and for that it seemes they were no Grants, but confirmation rather of customes, and they further denied that the customes are confirmed by the *Statute* of 7. R. 2. for this is only for the confirmation of *Magna Charta*,

as, and of all former *Statutes*, and of *Charta de Foresta*, and the liberties of the holy Church, and there is not any mention of the customes of *London*, but to this the Lord Coke answered, that they ought to credit their returne, and for that it seemes, that it is a private Act, and they ought to adjudge of that as it is made, as 7. H. 6. 6. And if it be false the party greived may have an Action upon the case, so it was agreed that the custome, that no forrainer shall hold any shop, nor sell in any shop by retayl, and that they may make By-Lawes, for the ordering of their ancient customes, are good customes without any confirmation by Act of Parliament, or Grant of the King or otherwise: And if any thing happen *De novo*, that they can *apponere remedium* with the restrictions aforesaid, for the Lord Coke saith that *London* is *Antiqua civitas*, and was of great fame and reckoning, amongst the most ancient Cities, for it was said by *Anianus Marcellinus* which wrote 1200. yeares past, that *London* was then *Opidum vetustum*, and *Cornelius Tacitus in vita Neronis* saith, that then there was under the Romans Government, there was here *Negotiorum copia*, & *commercia maximorum celebris*, and he well knew for he was here seven years, and married the Daughter of *Agricola*, who was ancient *Gilda Mercatoria*, and for that it was well governed and continued in good Order, for *Ubi non est ordo, ibi est infirmium & sempiternus Horror & confusio*, and *Gilda* is a Saxon word, and is the same for *Fraternitas*, and *Northfolk* and diverse other places in the Country the name continued, but this is another sence, for *Gyld* signifies to pay, and for that it is sometime demanded if a man inhabite in a place gildable or within Franchise, and the Place gildable is subject to scot and Lot, and all other charges, but the Franchises are places exempt, but no person which is of a *Gyld* or fraternity, may be exempted not by the Grant of the King nor otherwise, but shall be subject to all the charges of the *Gyld*, and Fraternity, and the King cannot make any man free of their *Guyld* when that is created, for there are but three waies to make a man free of that.

First, by Birth which is the most eldest.

Secondly, by Service which is of merits.

Thirdly, By redemption which is power which only remaines in the Maior, and the Court of Aldermen, in this case in *London*, and such *Gyld* can never have beginning but by Grant, but by prescription, as the custome of *Gavelkinde*, that a man may devise his Lands, or that the Land shall descend to the youngest Son, and that the King cannot make, any stranger free of such *Gyld* or Fraternity appears in *Rotulo patentium*, 32 Ed. 3. Where the King by his Letters patents granted to one *John Faulcon*, that he should be frank

frank and free of the City of London, and that he should keep an Apothecaries shop there, but the Patentee could not have his Freedome by this grant, and for that the King wrote his Letters to the Maior and Aldermen, and requested them to make the sayd *Faulchon* free of the sayd City, and upon that it was done accordingly, but not upon the Grant, and so it was adjudged in *Darcies case* 44. *Eliz. Trinity*, that if the King grant to one the sole making of Cards in England, and that none shall bring any Cards into England to be sold but the patentee, and it was adjudged that though none may have Park or Warren, and such other matters of Pleasure without the Kings Grant, and though that playing with Cardes be but a matter of Pleasure, yet the making of them is a matter of profit, and the bringing of them into England is a matter of Trade, and the inhibition of that is hinderance of Trade, and makes a Monopoly, that the Grant was voyd, and 3 *Ed. 3. 3. Iohn of Sudfords Case*, where the Case was, a Free-holder levied a fold upon his Soyl, and Freehold of his own, and the Defendant spoyled it, and broke it, and upon that the Plaintiff brings a Writ of Trespass; the Defendant justifies that he was Lord of the Town, and there had been a usage there, and had been of time out of memory, &c. That no man of the same Town ought to levy a fold without the agreement and leave of the Lord: And for that that the Plaintiff had done it, the Defendant pulled it down as wel to him it was lawfull, and it seems a good custome, and with this agrees 5 *Ed. 3. Iohn de Hayes case*, and 10 and 11 *Eliz. Dyer* 279. 10. prescription, by the Maior Sheriff, and Citizens of York; Goods forraigne bought and forrain sold shall be forfeited, and that he may seise them it was adjudged a good prescription, but the King by his Letters Patents, cannot give such power to them.

And Coke was cleerly of opinion, that the case was not within the Statute of 9 *Ed. 3. chapt. 2. 25 Ed. 3. 11 27 Ed. 3. 11*. And it was agreed by them all, that a Merchant or any other man may sell Goods in grosse, as he may sell a hundred tun of wine, or peices of Cloath, and one Tun of Wine to one man, or a peice of Cloath to one man, and another to another man, till he hath sold all, that this was not retailing, but they cannot sell by the yard or keep a shop, but it was also agreed that some goods a man might sell as well in their Market, if he do not keep a shop here without any offence, and it was objected that this By-Law was not good, for that it was for private good, and also the penalty which was to be inflicted was too great.

For first the Maior, Aldermen, and Citizens, make the Law, the suit for the penalty ought to be before the Mayor, and the Maior and Citizens ought to have part of the Penalty, so that the Mayor shall



shall be Judg in his own cause, which also was one of the Reasons of the Judgment in the Chamberlain of *Londons* case 5. *Coke* for that that the penalty was so small, that is a penny for every cloth which shall be sold in *Blackwell ball*, and this was for publick good, for here shall be search if it were good and merchantable, but it was agreed by all, that every Town may make a By-Law, which is *pro bono publico*, without any prescription or custome, and this shall be good, and being made by the greater part shall bind the residue, but if it be for private good, as for the ordering of the common or such like, shall not be good to bind any man without his assent, without speciall custome, according to the Judgements in the Chamberlaine of *Londons* Case, and *Clarks* case 5. of *Coke* in his cases of By-Lawes: But *Coke* is cleer that the remedy, that is, the By-Law was good and agreeing to the custome in every point, and that the penalty was fit and good, and for quantity and quality, and that to the quantity he agreed, that they could not inflict confiscation of Goods nor Imprisonment, but may inflict pecuniary punishment, as it appears by *Clarks* Case, and the Action may be brought for that, so that for the quality it was good: And so as to the quantity which was *Secundum quantitatem delicti*, for he conceived it was a greater offence, to hold a private shop then publick, for this is not in view nor subject to search & reformation, as well as if it were publick, and for an old Act of Common Council, he which keeps a publick shop shall forfeit ten shillings, and *clam delinquens punietur magis quam palam*, & now the ounce of silver is increased in value, for it is worth five shillings four pence, and then it was worth but three shillings four pence, and so for quantity and quality *Et congruum & ratione causarum*: And it seems to him that it is not *Bona fide*, that a Forrainer should hold a private shop, but *Dissentaneum*, for *London* is a Market overt, every day in the Weeke, but Sunday, as it appears by 11 H. 6. 19. And in *Dunstable*, the Prior brought an Action against a Butcher, for that that *Dunstable* was an ancient Town, and that this was a market overt two dayes in the Week, and the Defendant sold flesh in an inward roome, the Defendant pleads custome to warrant that, and adjudged that it was not good, for the usage of Trade in such Corners is not, *Bona fidei consonant*, and after he pleaded that he sold the flesh in an open shop in the Market, and this was allowed to be a good Plea, and if it be so in *Dunstable*, a fortiori, it shall be so in *London*, and for the same reason also it shall not be *Rationi Consentaneum*, to hold such inward shops, and also it is for *Communi utilitate*, that is, of the Citizens of the King, and of all others, that Forrainers shall not hold any shops in *London*, for it appears by the return that Forrainers shall not be subject to Scot and Lot in *London*, and shall not be Officers

Officers which are matters of great charge, so that if it shall be so they should be preferred before Free men, and without question it is discomodious for the Citizens, that any Forrainer should use any Trade here, and it would be a distruction to Citizens, that a Forrainer should not be subject to their charges, and yet should take benefit of the Trade within the City.

Secondly, And for the Benefit of others that strangers should not be received to use any Trade within the City, for this is the cause of Depopulation, depradation, and distruction in all other Townes and Burroughs in *England*, which is prejudice to all others.

Thirdly, it is prejudiciall to the King, that such a company of Inhabitants should be resident in *London*, which is *Camera Regis*, for this is the cause of Infection of the Aire and sicknesse, so that the King and all the State is prejudiced by it, but the sole doubt which was conceived by *Coke*, was for that that it doth not appear by the return, that the Defendant had used the Trade of Tallow Chandlor nor sold any Candles, but only that he kept a shop, and used the mistery of making Candles, but if the return had been that he used the Trade of Tallow Chandlor, this had been good, for that implies *Tantamount*, for that had been, that he had sold, for Trade is in *Tradendo*, which is to deliver over, and the Intent of the act is not that hee shall be punished for making of Candles, if hee do not sell them, for the sale is the wrong, and so the Servant of every Noble man or other which makes Candles or other thing for his Master, or for his own use, should be within the penalty of the Act, and with this agreed *Foster and Daniel*, and for this cause only it was resolved that he should be delivered and not remanded.

Hillary 7. Jacobi, *In the Common Bench.*

Cholke against Peter.

THE Case was this, The Lord *Rich* being seised of the Chase of *Hatfeild*, granted and sold to Sir *Thomas Barrington* Knight, and his Heires, all the Wood growing, and to grow upon a part of that, and excepted the soyl, and further that he might inclose every sixteen Acres of that, and this to hold in severall for the Prservation of the Spring, according to other Statutes of the Realm, and this Grant was confirmed by a private Act of Parliament, and that the Grantee might hold it in severall without suit of the Kings Officers, with a saving of the right of all strangers, and a Commoner put in his Beasts to take his common in one parcell of that which was inclosed, against whom the Grantee, brought an Action of Trespass, and in this the only question was, if this Grantee of the Trees, which

where the  
Owner of Wood  
may Inclose.

Hutton.

had not any Interest in the Soyl, might inclose against a Commoner by the *Statute of 22. Ed. 4. chap. 7.* was the question, for it was agreed, that if a man grant Trees growing and to grow, to one and his Heires, and except the Soyl, the Grantee hath Fee-simple in the Trees, but hath nothing in the Soyl, according to the *14. H. 2. and 3. H. 6. 45. Ives case, 5. Coke 111.* So if a man make a feoffment of land except the Woods, all woods are except by that, and if Woods be cut, and after grow againe in the same place, this is also excepted; But if woods after grow in another place this shall not be excepted, for it was no wood in *Esse* at the time of the feoffment, so if a man grants to another to dig Coles in his Soyl, this is but to take profit, and the Soyl doth not passe, as it is agreed in *11. Eliz. Dyer 245.* And it was said by Hutton Serjeant that he had seen an *Ejectione Firme* brought upon a Lease of *Usura terra*: But it was agreed by Coke cheife Justice and Foster, that the *Statute of 22. Ed. 4. chap. 7.* was repealed by the *Statute of 35. H. 8.* for this is the negative, and for that is repeal of a former *Statute*, but if the last had been in the affirmative otherwise it should be, and it was also agreed that this was not within the *Statute of 35. H. 8.* for that appoints of what age the wood shall be when it shall be inclosed, and by this recompence is given to the Commoner; but here it is not averred by pleading of what age this wood was which was inclosed, and for that it was adjudged that the Action is not maintainable against the Commoner, see *Pasche 8. Jacobi* for another argument at the Bar, and also by the Judges.

Hillary 7. Jacobi, 1609. In the Common Bench.

Vivion against Wilde.

Arbitrement.  
Submission.  
Revocation.

A Man was bound in an Obligation to another with Condition, to stand to, abide, and performe the award of two Arbitrators, and before the award, by his writing the Obligor revoked the authority of one of the Arbitrators: And it was agreed by all, that this Obligation is become single without Condition, and yet it was not pleaded that the Arbitrator had notice of the revocation before the award made: And yet for that it was pleaded, that *Revocavit*, it was agreed that that implies notice, for without notice it is no revocation: But it was agreed that if a man submit himselfe to the award of another, and after he revokes his authority: But before the Arbitrator had notice of that he makes the award, the award is good and shall be performed; so if a man make a Feoffment and Letter of Attorney to make Livery:

And

And before Livery made he revokes the power of the Attorney : But before notice the Attorney makes Livery, this is good, but if the Feoffor makes a Lease or feoffment to another before the Livery made by the other, this is a Countermand in Law, and shall be good without notice, for *Fortior est dispositio legis quam hominis* : But where a man makes actuall revocation of the authority, and before notice the other executes his authority, and in pleading the other pleades; *Quod revocavit*, the other party may reply, *Quod non revocavit*, and give in evidence that he hath no notice of that before the execution of his authority, and this is good, for without notice it is no revocation, where revocation is the act of the party. The case is entred *Trinity 7. Jacobi Rotulo 2629. Vivion against Wild.*

Hillary 7. Jacobi, 1609. In the Common Bench.

Smallman against Powys.

A Man made a Lease for life rendring Rent, and after the Lease by Indenture in consideration of fifty pound, deviseth and granteth the Reversion, to have from the day of the date for 99. yeares rendring a Rent also, which was lesse then the first Rent, and the Grantee of the reversion destraines for the rent reserved upon the Lease for life being behind: and the sole question in this case was, if the reversion shall passe without Attornment, and it was said, that in all cases where a use may be raised by the Common Law, and that it shall be performed by order of Chancery, that in these cases, the use shall be executed by the *Statute of 27. H. 8. of uses*; and one case was cyted by *Harris Serjeant 14. and 15. Eliz.* where the Brother was Tenant in tayl, the remainder to his Sister in tayl, the Brother by Deed which was Indented in parchment, but made in the first person, and no mention of Indenting in the Deed, and the Deed was Inrolled within three moneths, and after Livery and Seisin was made, and it was adjudged that the Deed enures as a Bargaine and Sale, and that nothing passes by the feoffment, so that it was no discontinuance, but that the Sister might enter after the death of her Brother without Issue.

*Coke* cheife Justice said, that it was a good Bargaine and Sale, though that the words Bargaine and Sell were not in the Deed, but he conceived if a Letter of Attorney be incerted in the Deed, so that it may appear that the intent of the parties is, that it should not enure as a Bargaine and Sale, but as a feoffment, there it is otherwise, so if a man covenants to stand seised to a use, if it be in con-

Devise and  
grant enures  
to bargaine and  
Sale.

Harris.

sideration of money, and the Deed is inrolled: there this shall enure well, as Bargain and Sale, as it was adjudged in *Bedels* case 7. *Coke* 40. a. but the *Statute* of 27. H. 8. of inrollments doth not extend to a Tearme, for the words of the *Statute* are, that no freehold shall passe, &c. But it seemes in the principall case, that the *Statute* of uses, executes the use which is raised by this Grant, and that the Grantor shall stand seised, &c. And all the Justices insisted strongly upon the Limitation of the Estate, from the day of the date of the Grant and the Reservation of the Rent immediately, and upon this concluded, that it was the intent of the parties that the Grantee should have the Rent reserved upon the first Lease; and should pay the Rent reserved upon his estate, and that when words of diverse natures are incerted in one conveyance, the Grantee hath election to use which of them that he will, as it appears by *Sir Rowland Haywards* case, and by *Danyel*, if a man makes a Bargain and Sale in english, and makes Livery, *Secundum formam Chartæ*, this shall not be good: But if it be in Latine otherwise it is, for this word *Vendo* is compounded of *Do*, and it is an apt word for *Sur.* that Livery might be made: And agreed all that the reversion passes well without Attornment, and that these words Demise and Grant shall be taken and enure to a Bargain and Sale, and Judgement was given accordingly.

Lease to determine upon Limitation.

A man made a Lease for yeares, to two if they lived so long, and it was resolved by the Court, that this determines by the death of one of them, according to the resolution in *Bradwells* Case 5. *Coke* 9. a. and Judgement was given accordingly, and there the case of *Trupenny* was recited, which was this; Lands was let to one for one and twenty yeares, if the Husband and wife, and the Issue male of their Bodies so long live, and it was there adjudged, that the Lease doth not determine, during the lives of any of them, for in this disjunctive, it is referred to an Intite Sentence, and is as much as if he had sayd, if the Husband or the Wife, or the Issue of their Bodies so long live.

Hillary 7. Jacobi 1609. In the Common Bench.

Borough of Tarmouth.

Grant of the King that the Borough should be incorporated.

THE King *John* by his Letters Patents granted that the Borough of *Tarmouth* should be incorporated, and the grant is made *Burgenfisbus* without naming of their Successors, and also he granted, *Burgenfisbus teneri placita coram balivis*, and in pleading it was not averred that there were Bailiffs there, and it was objected that the Borough cannot be incorporated, but men which inhabite in that,

but



but to that it was resolved that the Grant is good, and the Lord Coke sayd, that he had seen many old Grants, to the Citizens of such a Town and Good, and so that the Grant *Burgensibus*, that the Burrough should be incorporated, being an old Grant should have favorable construction, but the doubt was, for that that it was not averred that there were Bailiffs of *Yarmouth*; and if a Grant to hold Pleas, and doth not say before whom, the Grant is voyd, according to 44 Ed. 3. 2 H. 7. 21 Ed. 4. and for that it was adjourned: But the opinion of all the Court was that the Grant made *Burgensibus* was good without naming of their Successors, as in the case of Grant *civibus*, without more.

Note that Executors or Administrators shall not finde special Bail for the Debt of the Testator, though that the debt be for a great sum as three thousand pound or more, for it is not their Debt, nor his Body shall not be lyable to execution for that.

Bayle.

43 Ed. 3. Suit was commenced, hanging another Writ, it is a good Plea, though that the Writ was returnable in the Common Bench, and the last Suit was begun in a Base Court, but if so be, and doth not appeare to this Court, that the Plaintiff begun suit in a base Court, for the same Debt, for which the Suit is here begun Attachment shall be awarded, see 2 H. 6. 9 H. 6. but this ought to appear to the Court by *Affidavit*, &c.

Suit begun,  
hanging another  
Writ.

Hillary 7 Jacobi 1609. In the Common Bench.

Chapman against Pendleton.

IN second deliverance, the case was this, A man seised of a house and fifty Acres of Land held by Rent, fealty, and Harriot service, enfeofs the Lord of three Acres parcell of the Land, and after infeofs the plaintiff in this Action of three other Acres, and upon this the sole question was, if by this Feoffment to the Lord of parcell Harriot service is extinct or not.

Casuall intire  
Services.

*Harris* Serjeant conceived that the Harriot remaines, for he sayd that it is reserved to the Reversion of the Tenure, but it is not as annual Service, but casuall, and it is not like to rectify, for that it is incident to every service, And by 43 Ed. 3. 3 It is no part of the service but Improvement of the service: And *Bracton* in his Treatise *De Relevijs* 2 Booke 2, 7. saith, that *Est alia prestatio vocata Harriot &c. Que magis sit de gratia quam ex jure*, and it is not like to a releife, see the Booke at large, and he agreed that if the Tenant had made fifty severall Feoffments to fifty severall men, that every of them shall pay a severall Harriot, as it appears by *Bruertons Case*, 6 Coke

Harris.

1. a, 34. Ed. 3. Harriot 1. 2 Ed. 2. Avowry 184. 9 Ed. 2. *Ibidem* 206. 11 Ed. 3. Avowry 101. 24 Ed. 3. 73. a, 34 *Affise* 15. 22. Ed. 4. 36. 37. 29 H. 8. *Tenures* 64. But he grounded his Argument principally upon *Littleton* 122. 223. Where it is sayd, that the reason why Homage and Fealty remaine, if the Lord purchase part of the Tenancy is for that that they are of annuall Services, and it seemed to him, that *Littleton* is grounded upon 7 Ed. 4. 15. *Extinguishment* 2. 8 Ed. 3. 64. 24. Ed. 3. B. Apportionment last case, which accords the reason, and upon this he concluded, that for that that the Harriot is not annuall, it shall not be extinct by the Feoffment but remaines, but he agreed if a man makes a Lease for years rendering Rent, and parcell of the Land comes to the Lord, the Rent shall be apportioned if it be by Lawfull means, as it appears by 6 R. 2. F. *Quid Juris clamat* 17. *Plesingtons Case*; and 24 H. 8. Dyer 4. 1. *Rushdens* case, by which, &c.

*Nicholls.*

*Nicholls* Serjeant, that it hath been agreed that it is intire service, and that then he concluded upon that that it shall be of the nature of other intire services, as it apperres by 2 Ed. 2. Avowry 184. and 34 Ed. 3. F. Harriot 1. 5. Ed. 2. Avowry 206. And he agreed that in the case of *Littleton* the Homage and Fealty remain, and the escuage shall be apportioned, but this is not for the reason alledged in *Littleton*, that is, for that that they are not annuall services, but for that that the Homage is incident to every Knights service, and as the Lord *Coke* sayd, fealty is incident to every service in generall, and the Tenant shall make Oath to be faithfull and loyall to his Lord for all the Tenements which he holds of him, and the reason for which the Escuage shall be apportioned, is for that that it is but as a penalty which is inflicted upon the Tenant for that that he did not make his services, as it appears by the pleading of it, and shall be apportioned according to the Assessment by Parliament, and by 22 Ed. 4. It appears that this purchase by the Lord, is as a release, and if the Lord release his services in part, this extincts the services in all, and he sayd there is no difference where an intire service is to be payd, every third or fourth year, and where it is to be payd every year as to that purpose, and yet in one case it is annuall, and in the other it is casuall, and yet in both cases if the Lord purchase parcell of the Land of the Tenant, all the intire services shall be extinct and gone, though that they are to be performed every third or fourth year, by which, &c.

*Foster.*

*Foster* Justice, that the Harriot is entire service, and for that though that it be not annuall, it shall be extinct by purchase of parcell of the Tenancy by the Lord, as if a man makes a Feoffment with warranty, and takes back an Estate of part, the warranty is extinct, as it appears by the 29. of *Affise*; so if a man hold his Land by the service

vice to reaire parcell of the fence of a Park of the Lords, and the Lord purchase parcell of the Tenancy, the Tenure is extinct, as it appears by 15 Ed. 3. And it is agreed in the 21 H. 7, in *Kellawais Reports by Fromick*, that there is no difference between Harriot and Releife, and Releife shall be extinct, and so he concluded that the Harriot is extinct.

Daniell.

Daniell Justice accordingly; and he said that this purchase shall be as strong as release: And if the Lord hath released the service intire for part, it shall be extinct for all, and if Tenant holds by Suite to the court of the Lord, and the Lord purchase parcell of the Tenancy the Suit is extinct, as it appears by 27. H. 7. and *Fitz. Na. Bre.* And so concluded that the Harriot service is extinct by the purchase aforesayd.

Warburton accordingly: And saith that in *Littletons Case*, the Homage and Fealty shall remain, for they are personall services, and for that shall remaine intire, and of Rent shall be an apportionment by the *Statute of Westminster 3. De quia emptores terrarum*: But for other intire services by the purchase of the Lord, be they annuall or casuall, and they are extinct, and 21, Edward 4, was a Suite for a Hawke, which was kept back twenty yeares, and so for Suit if the Tenants make a feoffment to diverse, they shall make but one Suit, but they all shall make contribution to the Suit, but if the Lord purchase parcell, he cannot make contribution: And though that the Homage and Fealty are personall services, the Horse and Hawke are of the nature of land, so the Harriot is of his goods, and if the Tenant hath no goods, the Lord shall loose it, and for that he concluded as above.

Warburton.

Walmesley accordingly: And he said, if a Tenant hold by intire services of two Lords, and one purchase parcell of the Tenancy, all the intire services shall not be extinct, but the other Lord which did not purchase, shall have them, for *Res inter alios acta, nemini nocere debeat*: To which *Coke* cheife Justice agreed, and he said if Harriot custome be due, peradventure it shall not be extinct by purchase of parcell of the Tenancy, for that is personall, and it is not Issuing out of land, but for intire services, which are Issuing out of land, he said there is no difference betwixt annuall services and casuall services which are intire, and so he concluded, as above.

Walmesley.

*Coke* cheife Justice accordingly, and he said there is no difference between annuall intire services and casuall, so that they are services to be paid at the death or alteration of every Tenant, or otherwise, but he said there is no doubt, but that Rent service shall be apportioned, though that the Lord purchase parcell, be that in

Coke.

in the Kings case, or of a common person, and this by the common Law without the aid of any *Statute*, for there is not any *Statute* that shall aid that, if it be not remedied by the Common Law, and he said that some Intire services may multiply, as if a man holds by payment of a payre of gilt Spurs, or of a Hawke, or a Horse, or others such like, and makes a feoffment of parcell, the Feoffee shall hold by the same intire services: But if the Tenant hold by personall services, as to cover the Table of his Lord, or to be his Carver, or Sewer at such a Feast, or such like, these personall services cannot multiply, if the Tenant makes a feoffment of part, for by this the Lord may be prejudiced, for peradventure at his house he will not include them, but he may distrain every of them to make the service: And he saith the reason for which Knights service shall be apportioned, is for that it is for the publick good, and for the good of the Common Wealch: But so are not the other personall services, and in the principall case he conceives, that if the Tenant had made a feoffment first to a stranger, and after the stranger had infeoffed the Lord, that by that all the intire service shall not be extinct, for by the feoffment of the estranger, was severance of the services, and he holds by a Harriot as well as his Feoffor, and for that nothing shall be extinct, but the Harriot due by that parcell, of which the estranger was infeoffed; and he agreed with *Walmesley*, that a Harriot custome shall not be extinct, where the custome is that every Tenant shall pay a Harriot, for there it is paid in respect that he is Tenant, and custome shall not be drowned by unity of Tenancy and Signiory: And for that he concluded that the Harriot for that, that it was intire service though that it were casuall and not annuall, that yet it shall be extinct, and Judgement was given accordingly.

*Hillary 7. Jacobi, 1609. In the Common Bench.*

*Michelborne against Michelborne.*

*Trade with Infidels without License.*

UPON a motion made for consultation upon Prohibition awarded: It was said by the Lord *Coke*, that no Subject of the King, may trade with any Realme of Infidells, without licence of the King, and the reason of that is, that he may relinquish the Catholick faith and adhere to Infidelisme, and he said that he hath seen a licence made in the time of *Ed. 3.* where the King recited that he having speciall trust and confidence that his Subject will not decline from his Faith and Religion, licenced him

(*ut*

*ut supra*) And this did rise, upon the recital of a licence made to a Merchant to trade into the *East Indies*.

Hillary 7. Jacobi, 1609. *In the Common Bench.*

Reade against Fisher.

**I**N debt the Defendant exhibits his suit in the Court of Requests, and there the Plaintiff in that Court denied, that the debt was paid, and the Court of Request awarded an Injunction, and upon Information of that, this Court awarded a Prohibition to inhibit the Suit there.

Prohibition to  
the Court of  
Requests.

Hillary 7. Jacobi, 1609. *In the Common Bench.*

Mors against Webbe.

**I**N *Replevin* the case was this; A man was seised of two Virgates of Land, and prescribed that he and his Ancestors, and all those whose Estates he hath in the said Virgates of Land, have used to have common in the feilds, &c. That is, when the feilds are fallow all the yeare, and when they are sown with Corn or otherwise severall, when the Crop is mowed and removed, for two Horses, four other Beastes, and a hundred and twenty Sheep, as appertaining to the said two Virgates of Land: The Defendant traverseth the prescription, and upon this they are at Issue, and the Jury found that there is such prescription: But further they say, that the Plaintiff made a Lease of six Acres parcell of the said two Virgates of Land in one of the feilds of, &c. with the Common of that thereunto belonging for the Tearme of ten years, and the Beastes for which the *Replevin* was brought, were in another feild of, &c. And if the prescription be suspended or remaines, they prayed the advise of the Court, and it was agreed that common appendant and appurtenant was all one to the severance, for if such a Commoner grant parcell of that Land to which the Common is appurtenant, or appendant, the Grantee shall have Common, *Pro Rata*, but if a commoner purchase parcell of the Land, in which he hath Common appurtenant, that this extincts all his Common: And it was agreed that Common may be appendant to a Carve of Land, as it appeares by the 6 *Ed. 3. 42. and 3. Assise 2.* as to a Mannor, but this shall be intended to the Demesnes of the Mannor, and so a Carve of Land consists of Land, Meadow, and Pasture, as it appeares by *Tirringhams case 4. Coke 37. b.* And Common appendant shall not be by prescription, for

Approvement  
of Common.



then the Plea shall be intended double, for it is of common Right, as it appears by the *Statute of Marston* chap. 4. And the common is mutuall, for the Lord hath Right of Common in the Lands of the Tenant, and the Tenant in the Lands of the Lord: And it was urged by *Nicholls* Serjeant, that the Common shall be apporportioned as if it were Rent, and that the Lessee shall have Common for his Lease, and then the Lessor hath no Common appurtenant or appendant to the two Virgats of Land, and for that the Prescription was not good.

*Coke* cheife Justice, if it had been pleaded, that he had used to have Common for the said Beasts Levant and Couchant upon the said Land, there had been no question but it should be apporportioned, for the Beastes are Levant and Couchant upon every part, as one day upon one part, and another day upon another part, and for that extinguishment or suspension of part shall be of all, as if a man makes a Lease of two Acres of Land, rendring Rent, and after bargaines and sells the reversion of one Acre, there shall be an apporportionment of the Rent, as well as if it had been granted and attornment: And he agreed that if a man have Common appurtenant, and purchase parcell of the Land in which he hath Common, all the Common is extinct, but in this case common appendant shall be apporportioned for the benefit of the Plow, for as it is appendant to Land, Hyde, and gain: And in the principall case there was common appendant, for it was pleaded to be belonging to two Virgats of Land, and for commonable Beastes: And he conceived also that the prescription being as appertaining to such Land, that this shall be all one, as if it had been said Levant and couchant, for when they are appurtenant, they shall be intended to Plow, Manure, Compester, and Feed upon the Land: And also he conceived that the right of Common remaines in the Lessor, and for that he may prescribe, for after the end of the Terme shall be returned, and in the intermin he may Bargain and sell and the Vendee shall have it, and shall have common for his Portion.

*Walmesley.*

And *Walmesley* Justice agreed to that, and that during the Terme the Lessor shall be excluded of his Common for his proportion.

*Foster.*

*Foster* Justice agreed, and that the possession of the Lessee is the possession of the Lessor, but he conceived when the Lessor grants to the Lessee six acres of Land in such a feild where the Land lies, and then the Beasts were taken in another feild: And so they agreed for the matter in Law, and also that the pleading was ill, and so confesse and avoid the prescription: But upon the traverse

as it is pleaded, the Jury shall not take benefit of it, and Judgement was given accordingly.

Termino Pasche 7. Jacobi 1609 In the Common Bench.

**T**HOU art a Jury man, and by thy false and subtil means hast been the Death and overthrow of a hundred men, for which words Action upon the case for slander was brought, and it seemed to Coke cheife Justice that it did well lye, if it be averred that he was a Jury man, and so of Judge and Justice, for *Sermo relatus ad personam intelligo debet de qualitate persone*, as Bracton saith, and in the like Action brought by Butler, it was not averred, that he was a Justice of Peace, and resolved that an Action upon the case doth not lye.

Action upon the Case for Slander.

But *Walmesley* Justice conceived that an Action doth not lye, for one Juror only doth not give the Verdict, but he is joynd with his Companions, and it is not to be intended that he could draw his Companions to give Verdict against the truth, and false and subtil means are very generall.

*Warburton* Justice agreed with Coke, and conceived that the Action well lies, being averred that he was a Jury man, as if one calls another Bankrupt. Action well lies if it be alledged that the Plaintiff was a Tradesman, and it is common speaking that one is a Leader of the Jurors, and a man may presume that other Jurors will give Verdict, and may take upon him the knowledge of the Act.

Bankrupt actionable.

*Walmesley* conceived that the Action did not lye, for that the words are a hundred men, which is impossible, and for that no man will give any credit to it, and for that it is no slander, and for that Action doth not lye, no more then if he had sayd that he had kild a thousand men. But Coke, *Warburton*, *Daniell*, and *Foster*, agreed that the number is not materjall, for by the Words his malice appears, and for that they conceived that the Action doth well lye.

Pasch. 7. Jacobi 1609. In the Common Bench.

Denis against More.

**A**ntony Denis Plaintiff in Replevin, William More Defendant, the case was this, Two joynt Lessees for life were, the Remainder or Reversion in Fee being in another person, he in Reversion grants his Reversion, *Habendum*, the aforesaid Reversion, after the death, surrender, or forfeiture of the Tenant for life, it hapneth,

Grant of Reversion.

that the Lease determines, for the life of the Grantee, and Remains to another for life, and resolved that this shall be a good grant of the Reversion to the first effect of Possession, after the Deaths of the Tenants for life, according to the 23 of *Eliza. Dier* 377. 27. And it shall not be intended to passe a future interest, as if it were void of the other party, and so was the opinion of all the Court, see *Bucklers case* 2. *Coke* 55. a. and *Tookers case* 2. *Coke* 66.

Error in Proclamation.

Upon a Fine the first Proclamation was made in *Trinity Term* 5. *Jacobi*.

And the second in *Michaelmas Term* 5. *Jacobi*.

And the third in *Hillary Term* 6. *Jacobi*, where it should be in *Hillary Term* 5. *Jacobi*.

And the fourth and fifth in *Easter Term* 6. *Jacobi*.

Forfeiture of Office of a Chirographer.

And this was agreed to be a palpable Error, for the fourth Proclamation was not entered at all, and the fifth was entered in *Hillary Term* 6. *Jacobi*, where it should have been in *Hillary Term* 5. *Jacobi*, and it shall not be amended, for that it was of another Term, and the Court conceived that this was a forfeiture of the Office of the *Chirographer*, for it was an abusing of it, and the Statute of 4. *H. 4. c. 23* and *Westminster* 2. Are that Judgement given in the Kings Court shall stand, untill they be reversed by Error.

Release.

A man is bound in an Obligation dated the third of January, and by Release dated the second day of the sayd Moneth of January, releases all Actions, &c. From the beginning of the World untill this present day, and delivered the Release after he had delivered the Obligation.

And *Coke* cheise Justice conceived, that a Release of all Actions untill the Date, shall not discharge duty after, but a Release, *Usque confessionem presentium*, that discharges Duties after the Date, and before the Delivery: But he conceived that the Day of this present time shall be the Day of the Date, and it shall not be averred that it was delivered 20. years after, and it shall not wait upon the Delivery of the Deed.

Error in a Writ of Dower.

A Writ of Dower was brought by *Frances Fulgham* against *Serjeant Harris the younger* in this manner, *Precipe*, &c. *Quod*, &c. *Frances Fulgham* Widdow, where the form in the Register (*Que fuit uxor*) and not Widdow, and the words of the Writ are, *Rationabilem dātem Tenementorumque fuerant Fran. Fulgham quondam uxor sui*, and yet it was resolved to be Error, see the Register, and yet it doth not vary in substance, and 38 *Ed. 3. In re nisi*

*nisi sunt*, all one, yet for that the forme in the Register is otherwise: The Justices would not amend it.

John Warren Plaintiff in Trespasse, and *Ejectione Firme* against Cicely Spackman, it was resolved that the admittance of a Copyholder for life was sufficient for him in remainder. Copy-hold.

In a Writ of Dower by Mistris Fulgham upon *Ne Unques couple &c.* pleaded, a Writ was awarded to the Arch-Bishop (in the time of the vacation of the Bishoprick of Lychseild and Coventry) who returned that he had a *Delegate*, which made a Commission to Babington Chancellor of the said Diocese, to make inquiry, and certificate of the said matter, which have certified that they were lawfully coupled in lawfull matrimony: And adjudged without question, that the return was not good, for the Arch-Bishop himselfe ought to execute it, and *Delegata potestas non potest delegari*, and for that it was ordered that he should amend her Certificate. Certificate of the Bishop.

See the Statute of 3 Ed. 3. That an Arrest, *Exundo & redundo*, from celebrating divine service, And it seemed to the Justices, that such Arrest is not lawfull, for he ought to be priviledged rather then a man which comes to any Court, to prosecute or defend any suit here. Minister Arrested.

Pasche 7. Jacobi, 1609. In the Exchequer.

### The Duke of Lenox case.

IN Trespasse the case was this, the King by his Letters Patents created the Duke of Lenox *Alneger*, and he made his deputy: And the Duke by the said Letters Patents of the King, was to measure all Clothes, and to have so much for every Peece, and to search and to view that if it be well and sufficiently made or not, and he made his Deputy, which offers to measure, search, and view, certain parcell of Worsted, and demanded the duty due to the *Alneger* for that, and for that, that the owner refused to pay it, he seised certain peeces of Worsted, and kept them, upon which this Action was brought. Grant of the King of Alnage.

And Haughton Serjeant for the Defendant, conceived that the sole question rests upon these Letters Patents of the King, and for that he would first consider. Haughton.

First if these duties of Subsidies and Aulnage are due by the Common Law, and if they are not due by the Common Law, then



then if they are due by Statute Law : And if they be due, neither by the Common Law, nor Statute Law ; then if the King by his *Letters Patents* may grant it.

And to the first he said : That Subsidy is ayd or help : And there are two manners of ayd, one which is Inheritance in the King, as ayd to make his Son Knight, or to marry his Daughter, and others which are given by grant of others, and these are not Inheritances in the King ; and these duties were not demandable by the Common Law, nor by Custome : And this appears by the 25. *Ed.* 3. 6. Where any prises were demanded which were due by the common Law, and some which were not due, and subsidie for Woolles were not due by the Common Law, but it was granted to the King and is now due, but this is by grant, and not by the Common Law, and in the 14. *Ed.* 3. A Statute was made for the King for his subsidy for Woolles, what part he should have, which part was given to him in quantity ; and in time of *H.* 6. A Statute was made by which subsidy was given to him during his life, and 36. *Ed.* 3. Subsidy was granted for three yeares, and after should not be any subsidy paid, as appears by 45. *Ed.* 3. And if subsidie were not due by the Common Law for Woolles, then may it be concluded, that it was not due for clothes, for Woolles grow without mans labour, and the 11. *H.* 4. and 13. *H.* 4. The King makes a grant of Alnage of clothes, and a Writ is awarded to the Mayor and Sheriffs of London, to give possession to the Patentee, which returns the Writ, that the Office was not granted before this time : And the Statute of 24. *Ed.* 3. was the first Statute that gave profit to the King for clothes : But he granted that the Office of Alneger was of ancient times, and an ancient Office, but it was no Office of profit, but an Office of Justice and Right ; and no Fee was due for the exercising of it, and that 1. *Ed.* 2. was a Grant of the Office of the Alneger, and 11. *H.* 4. was a Grant of the Office of Alneger for Canvas, but it doth not appeare by any account, that the King had any profit for the Alnage it selfe, or upon the said Grants, either before or after, and allowing that there were accounts for Cloth, yet it doth not appeare that there were any accounts for Worstedes, The Statute of 27. *Eliz.* gives subsidy of four pence for every broad Cloth, so that the Statute made expresse mention of broad Cloth, but there was not any mention of Worstedes, and this Statute shall not be taken by equity, though that the Statute of 1. *R.* 2. 1. 2. for escapes by the Warden of the Fleet, being a penall Statute, yet for that, that it was for a generall mischeife, shall be taken by equity, as it appears by *Platts Case* in the Comment : So the Statute of 9. *Ed.* 3. chap. 3. provideth that  
where



where Debt is brought against diverse Executors, that they shall have but one Essoyn, and the *Statute* mentions Executors only, yet Administrators are taken within the equity of this *Statute*, as it appears by 3, *H. 6.* yet in this case at the Bar, the *Statute* of 27. *Eliz.* was not for the remedy of a mischeife, but is a Grant to the King, and Grant of one thing cannot be Grant of another thing, as if the King pardon an Offence, another Offence cannot be pardoned by this: As it appears by the Arch-Bishop of *Canterburies* Case, 2. *Coke*, where the *Statute* of 1. *Ed. 6.* by which diverse Chantryes were granted to the King, it shall be intended a Grant within the *Statute* of 31. *H. 8.* of Monastries which was before: But further he said that the matter is insufficient to raise a duty to the King, for in vain is the property of any thing in one man if another man may charge it: And in this case the King cannot grant these Clothes, and for that he cannot charge them, and the *Letters Patents* of the King are not sufficient only to charge the Goods of any man, see the case of 11. *H. 4.* But he agreed that if the King grant a Ferrey, and that every passenger shall pay for his passage four pence, this is good, for every man may chose whether he will passe by that or not: And none shall be constrained to passe by that, but Grant of the King to one, that none shall bring in any Cards into *England* but the Patentee only is void; and it was adjudged in *Nicholls* Case in 18. *Eliz.* That if any man offend in not repaying of a Bridge, the King cannot pardon it, for the Subjects of the King have Interest in that, and further he saith, that the Grant was against an expresse *Statute* made in 7. *Ed. 4.* 1. for this appoints that the Alneger shall not take any Fee, by which the Grant of the sayd Office shall be without Fee, and this Grant is with a Fee, that is, so much for every Cloth, he agreed that this is an affirmitive Law, and for that it shall not bind the King generally, but when it is for determination of right or wrong, the King shall be bound by that, and the Patent is grounded upon the *Statute* of 27. *Eliz.* or 47. *Ed. 3.* 1. which are made for the breadth of Clothes; and here the Patent hath not any respect to it, for if the peece be but of the breadth of a foote, if it be in length according to the *Statute*, so much shall be payd for that as if it were a broad Cloth, and for that there is not any equity in it, that the *Statute* seemes to intend, for the charge ought to be correspondent to the quantity of the Cloth, as 41. *Ed. 3.* 16. Avowry for distresse of sixteen Oxen for nine pence Rent, and adjudged that it was found outrageous, and therefore he was amerced for taking of an excessive distresse, and so he demanded Judgement for the Plaintiff.

*Dodridge* the Kings Serjeant, that the question is if the Alne- *Dodridge*  
ger

ger may meddle with this new kind of Drapery and shall take Fee for that, and it seemes to him that he may meddle with all things, which consists in Measure, Waying, and Searching: And may exercise his Office in this for necessity of Merchandise, for Common-Wealth cannot consist without commerce, and *Pecunia est rerum mensura*, and provides to make recompence in value for every thing, as it is said by *Keble* 12. *H.* 7. 24. *b.* and then to reduce all other things in certain, for it is the certain value of money, is known to be a direct meanes to know the quantity of all other things, and that is by waight and measure, &c. And for this for the necessity of commerce, there ought to be a publick Officer, which shall have the care and charge that such things shall be well and duly made, for the profit and benefit of the Common Wealth, and this Officer is as ancient as there hath been any commerce within this Realme, and he made illustration thereof by diverse Rolls of the Exchequer in time of 2 *H.* 4. By which it appeares, that then there were Marts for cloth: And that then was an Officer, to search, measure, and see the said clothes opened, for then was an Officer made of purpose to measure and search the clothes, which were sold in a Faire at *Worcester*, by which Rolls also it appeares, that there was an Assise of breadth and length of clothes before any Statute for that purpose, by the Statute of *Magna Charta*, made 9. *H.* 3. chap. 25. It is provided that *una mensura*, and *una latitudo pannorum tinctorum, russatorum, & Haubergettarum*, that is; *Duo ulne infra listas per totum Regnum Anglie*, and 1 *Ed.* 1. amongst the Rolls of the Patents in the Tower, it appears that the Office of Alneger was granted *De omnibus pannis tam ultra mare quam infra mare*: And 1. *R.* 2. was another Grant of the Office of Alneger, and 14. *R.* 2. the King granted the Office of Alneger in *Ireland*, and by the Statute of 5. *Ed.* 2. it is provided that the estretes by the Warden of the Alnage should be delivered into the Exchequer to the Treasurer of the Exchequer, and 17. *Ed.* 2. the Office of Alneger was granted to one *J. Griffin* of all the clothes made beyond Sea, till the 1. of *Ed.* 3. by which the use appeares in the time of the Raigne of King *Ed.* 3. upon which records he observed, that the Office of an Alneger is an ancient Office, and that he hath power to see, search, and measure, *omnes pannas tam ultra marinas quam infra marinas*, without any exception, and for that it cannot be denied, but that he ought to meddle with wollen clothes; and he ought to meddle with all for one selfe same end and purpose, that is to fasten a Seale to them. Secondly, That the Law depends upon the Art and invention of Artists, then no Law shall prevent more mischeifes, for there is no end of Art and Invention. And thirdly, and that in this *Individuo*, for there is not any Invention.

vention made of Worsted, till the time of *Ed. 2.* for it was a new commodity, and then first Invented, and after it was first invented, there was immediately an Officer made for that, and for this it appears that *1 Ed. 3. Nicholas Shoverler* was made generall Alneger for that, and after that came *Wadlowes and Sayes*, and also an Alneger was immediately made for them, by which it appears, that so soon as new stuff was invented by the Artist that there was a new Officer to search, and see that, and prevent that deceit should not be used in it, and then for the Fee of the Alneger, that is grounded upon a just Law, which is the Law of *Retrebutio, for Dignus est operarius mercede*, and though it doth not appear by their Patents, that they had taken any Fee for the exercising of their sayd Office, yet it appears by their Accounts that they have had a Fee for it, and if they have no Fee of the King, then it follows that they ought to have a Fee of the Subject by Common Law, the Office being for the publick good, and the Patent is, upon which the Duke shall have the sayd Office as hitherto they have had it, and it appears by the *11 of H. 4. 58.* and the *12 of H. 4.* That the King may grant and annex Fee to a necessary Office to be taken of the Subjects, but it was objected that the Alneger had no Fee, and if he had that, he was abridged of that by the *Statute of 2 Ed. 3. 14.* Where it is sayd that they shall be ready to make prooffe; when they should be required to measure, without taking any thing of the Merchant, but this refers only to the Maiors and Bailiffs of Towns, where such Cloathes shall come, and not to the Alneger, and that the *Statute of 11 Ed. 3. chapter 3.* consists upon two parts.

First, that Clothiers may make Cloth of what length and breadth that they will.

The second, that no Cloth shall be brought into *England, Wales, or Scotland*, but that which is made in them, and then if the Clothiers have such liberty to make Cloath of what length and breadth they will, then there is no need of Alneger: As to that it was answered, that there was need of him to see and search the Goodness of that, as well as the length and breadth, And also the *Statute of 25 Ed. 3. chap. 4.* Provides that all Clothes vendable, which shall be sold whole Cloathes in *England*, in whose hands soever they are, shall be measured by the Alneger of the King, and the *Statute of 27 Ed. 3. chapter 4.* Statute the first, provides that no Cloathes shall be forfeited, though they be not of the same *Affise*, but the Alneger of the King shall measure the Cloath and mark it, with such a mark, that a man may know how much that contains; so for these *Statutes*, and for the reasons aforesaid it appears, that it belongeth to the Office of an Alneger to survey, measure, and marke Cloathes, as well by the Common Law, as by the Statute

Law; It was objected, first that the *Statute of 27 Ed. 3.* limits and appoints that the Alneger should measure broad Cloath, and doth not make mention of any other Cloathes, but broad Cloathes, and for that it seems that he shall not meddle with any other Cloathes, but it appears by diverse Accountts, that he should meddle with Wadlowes and Sayes, and the *Statute of the 17 R. 2. chap. 2.* Provides that none shall sell any Cloath before that it be measured by the Alneger of the King, and that none shall make any deceit in Kerseys.

The second Objection that Cloathes of Lesser *Assise* then halfe broad Cloath, the Alneger shall take nothing by the *Statute of 27 Ed. 3.* This is intended of Broad Cloath which hath used to be sold, and these be in lenth above the broad Cloath, and in breadth as Kerseyes, and others were but as Remnants which have not been used to be sold, no subsidy was due by the Common Law, for that is granted by the *Statute of 27 Eliz.* And in this Grant two things are to be considered.

First, the *Statute of 2 Ed. 3. and the Statute made at Northampton*, where it was petitioned to the Parliament, that the King would remit the penalties, and the King should have recompence for the loss, and for this the *Statute* gives subsidy, this was no private gift, but a publick gift, and the reason of this was the retribution of his loss and the King payd for it, and that for this he should have a Subsidy.

Secondly, Wools are the continuall Treasure of the Realm, and let them be of what nature they will they are called *Panni*: And for that when the King hath a settled Inheritance, it is no reason that the slight of an Artist should prejudice the King: And it appears by the *Statute of 11 H. 4. 7.* that was made to prevent the barrelling of Clothes, and the making of them into Garments, and the transporting of them beyond Sea.

And also the third reason is usage, for all other clothes pay Subsidy, and there is no other Law to charge them but the *Statute of 27 Ed. 3. 4.* That this subsidy is settled in the King, and no devise of man may divest it, the *Statute of 27 Ed. 3. and 47. Ed. 3.* Set down and alter the length and breadth of clothes, and yet the Custome remains.

The fifth objection that the *Statute* doth not extend in equity to a thing which is not in *Rerum natura* at the time of the making of the *statute* which is false position, for how can makers of *statutes* prevent all mischeifes, *Eaton and Studdes case Com. Aristotle in Ethicks liber 5. chap. 10.* saith, that *Equitas est correctio legis generatim late, qua parte deficit.*

And *Bracton* in his first Book of new *Division Ch. 3.* saith, that *Equitas*

*Statutes, how  
to be under-  
stood, &c.*

*quitas est rerum convenientia que in paribus causis, paria desiderat jura & omnia bene coequi paret & dicitur equitas quasi equalitas*, and for that it is enacted by the *Statute of 11 Ed. 1. Alton Burnell* for understanding of the *Statute*, that if prayfers of Goods prayse them at too high a value, that they themselves shall have them at the same price at which they were prayfed, and after another *Statute* is made, which provides, that lands shall be extended upon a *Statute*, which is taken to be within the *Statute of Alton Burnell*, which was made before, and so it appears by *Littleton* that the *Statute of Gloucester* provides, that warranty by Tenant by the Curtesie shall not bind the Heir without Assets, and an Estate tayl was not then created but it was afterwards created by the *Statute of Westminster 2.* which was made the 13 of *Ed. 2.* Yet this Warranty shall not binde the Heire in tayl, and also two objections have been made against the Patent.

First, That it was against an expresse *statute*.

Secondly, That it did not observe any rate or proportion, proportionable to the quantity of the peece, to that he answered, that it is not against any *statute*, see 7, *Ed. 4. 2. 27. H. 7. 5. H. 8. 2. 1. and 2. Phil. and Mary*: It is not against any of those, for those provides and ordaines, that there shall be Wardens for the better performance of all things which are to be done by the Alneger, and doth not deprive the King of any thing given to him by any former *statute*, but adds further care and diligence, and when there is a Law which adds care and Manner and Forme to a former Law: That doth not abridge and deprive the former Law, of any thing given by that, and if the Wardens do not do their Office, yet that cannot prevent but that the Alneger may do it, which to him belongeth, as in 1 *Ed. 4. 2.* For Indentures taken in Sheriffs Turnes, which should be delivered by Indenture to the Justices, yet the Justices may proceed, though they be not delivered by Indenture, and so it is in 43. *Ed. 3. 11.* The Sheriff ought to array his Pannell four daies before the taking of that, and adjudged that if he doth not, it shall be no error in 43. *Ed. 3. Assise 22.* and so the *Statute of 5. and 6. of Ed. 6.* provides that the Mayor appoints to viewers and searchers, this doth not abridge the power of the Alneger, for this is but an addition of greater care and diligence, and by the *statute of 39. and 43. Eliz.* If upon a search they find any forfeiture, they shall have it, but if they do not find the Alneger may find it, and then the King shall have it.

And to the Second he answered; that true it is for every 64. of clothes, the Alneger ought to have foure pence, for his Fee, and though that some peeces of cloth are more broad then others,



yet the labour of the Alneger to measure them is all one: So he concluded, and demanded Judgement for the plaintiff.

Hillary 7. Jacobi, 1609. *In the Common Bench.*

Rutlage against Clarke.

*Account.*

**I**N Account the Plaintiff declares, that the Defendant hath received of his money by the hands of a stranger to give an account: The Defendant pleades in Bar, that he received to deliver over to a stranger, the which he hath done accordingly, without that, that he received it to make any of account otherwise then in this manner, and it was resolved that the Plea in Bar was good without traverse, for when he received the money, he is to deliver it over, or to give an account of it to the Plaintiff, so that he is accountable Conditionally, but the traverse is repungnant to the Plea, though it be otherwise, or another way, against the Book of 9. *Ed.* 4. 15 See 41. *Ed.* 3. 7. 1. *Ed.* 5. 22. *H.* 6. 49: 21. *Ed.* 4. 4. 66, 1. *Ed.* 5. 2. that it is a good Bar without traverse: But Brooke in abridging the case of 21. *Ed.* 4. 66 in Title of account, saith, that it seemes that the traverse ought to be without that, that he was his receiver in other manner; and there and in the Book at large are, that Justices, that is, Coke, Nele, and Vavasor against Bryan; that it ought to be traversed: But here in the principall case, it was adjudged that the traverse made the Plea ill.

Hillary 7. Jacobi, 1609. *In the Common Bench.*

Dunmole against Glyles.

*Devise of a  
Tearme.*

**T**HE case was this; Grand-Father, Father and Son, the Grand-Father was possessed of a Tearme for two and twenty yeares to come, devised to the Son the Land for one and twenty yeares, and that the Father should have it during the Mynority of the Son, and makes the Son his Executor and dies, the Son being within the age of one and twenty yeares, the Father enters into the Land, and makes a Lease for seven yeares by Indenture, untill the Son came to full age, the Father makes his Son his Executor and dies: The Son enters by force of the devise made by the Grand-Father: And the question was if the Son shall avoid the Lease made by his Father, and it was agreed that he might, in prooffe of which a Judgement was cyted which was in the Kings Bench, *Mich.* 5. of *Eliz.* Rot. 459. or 499. In the Priorese of *Ankeresse* Case, where a  
Tearme

Terme was devised to one, and if he died within the Terme, then to such of the Daughters of the Devisor, which then should not be preferred, the Devisor dieth; the Terme was extended for the Debt of the first Devisee, and then he died, the extent was avoided by the Daughters not preferred, and they grounded their Judgement upon the former Judgements in *Welshen and Eltingtons* case, and *Paramores and Yardleys* case in the *Comment.* and for that the Law intends that a Devisor is *Inops consilij*, and for that his devise shall have favourable construction according to his intent appearing within the devise, and it was said by *Coke* that in many cases, a man may make such an Estate by devise, that he cannot make by an Act executed in his life time, as it was adjudged in *Graveners* case, where a man devises his Lands to his Executors for payment of his Debts, that there the Executors have Interest, that there the Executor of Executors shall have that, and such Estate cannot be executed by Act in the life of the Devisor, and so it was concluded by them all, that the Son shall avoid the Lease made by the Father, for the Devise was Executory, and doth not vest till the full age of the Son, and then Executor, and shall avoid all Acts made by the Father, by which Judgement was given accordingly.

Freeman against Baspoule, See 9. *Coke* 97. b.

THE case was this; *A.* was indebted to *B.* and they both died, the Heire of *A.* for good consideration, assumed to the Administrator of *B.* that he would pay to the said Administrator the said Debt, and for the not payment of that, according to the Assumption the Administrator after brought an Action, and then the said Heire and the Administrator submitted themselves to the award and arbitrement of *C.* and became bound one to the other; to stand to the award accordingly, so that the said Arbitrator makes his award of all the matters and controversies between them before such a day, *C.* the Arbitrator before the day recyted the Assumpsit, and the debt as aforesaid, and agreed that the Heire should pay the Administrator so much money, and that published according to their submission: And in Action upon the case, *Nullum fecit Arbitrium* was pleaded, and upon demurrer, it was objected that the award was void.

Award.

Submission.

First, For that it was for one party only, and nothing was arbitrated of the other, and to prove this the Book of 7. *H.* 6. 6. was cited, and 39. *H.* 6. 9. see 2 *R.* 3. 18. b. And this also appears by the pleading of an award, for he which pleades it; that he hath performed all things which are to be performed of his part:

And

And that the other pleades performance of all thing which are to be performed of his part, by which it appears that there ought to be performance of both parts, and by consequence one award to both parties, according to 22. *H. 6.* 52.

Arbitrement.

Secondly, that the award was void, for that, that the submission was of all controversies, so that the Arbitrator delivered his award of all controversies, &c. And there was no award of the said Suit between the parties, and for that he hath not made an Arbitrement of all controversies, and by that the award was void, and to prove that, the Bookes in 4 *Eliz. Dyer* 216. *Pumfrees* award, and 19. *Eliz. Dyer* 356. 39. and 39. *H. 6.* 9. Where it is said, that if the submission were of all things, and the Arbitrement of one only, that is a void Arbitrement.

Thirdly, For that it was not limited within the award, at what day, nor at what place the money should be paid by the Heire to the Administrator, and for this cause also it shall be void, for it ought to be payd immediatly; and if the Heire cannot find the Administrator, he forthwith hath forfeited his Obligation, and for that in this point it is uncertain, and for that shall be void, as it is in *Samons* case, 5. *Coke* 77. b. Where the Arbitrator awards, that one party shall enter into Bond to another for injoying of certain Lands, and doth not say in what Sum, and adjudged void for the uncertainty, and so in this case by which, &c. But it was answered and resolved, that the Arbitrement was good.

And to the first objection it was resolved, and agreed, that every award ought to have respect to both parties, if it be not a matter which concernes one party only, and neither recompence nor acquittall due to the other party in which case the award shall be good: And it was resolved in the principall case, that the award was made of both parties, for one was to have money, and the other though there was no expresse mention, that the other should be discharged of his Assumpsit, yet the award was a good discharge in Law, and may be pleaded in Bar upon an Action brought upon the Assumpsit, and so it was for both parties.

And to the second objection, it was agreed, that where submission is, with *Ita quod*, &c. as above, that there the Arbitrators ought to make arbitrement, of all the variances and controversies, referred to their arbitrement, and if they do make no arbitrement, of all the matters of which the submission is made, the award is void, but if the submission be generall, as of all matters in variance or controversie between them: There if the Arbitrator makes his award of all matters which are known to him, the award shall be good: As my Lord *Coke* conceived, though that there

there are other matters in variance, of which the Arbitrator hath no notice, as if divers Creditors sue a commission, upon the *statute of Bankrupts*, and an another person to whome the *Bankrupt* was indebted, doth not come in as a Creditor, nor give notice to the Commissioners, that the *Bankrupt* was indebted to him, he shall not take benefit of the commission, for the Commissioners cannot relieve those Creditors of which they have no notice, as it appears by the case of *Bankrupts* in 2. *Coke*.

And to the third objection it was answered and resolved, that the award was good, notwithstanding that no place be expressed where the money shall be paid, for in Law that ought to have reasonable construction, and the party ought to have reasonable time for the payment of that, but *Foster* conceived that it is not good, for it seemed to him, that if the award shall be good, that the Obligation of submission shall be immediately forfeited, for that there was neither time nor place, where the money should be paid, but this was answered with the Bookes of 3. *H. 7. 16. Ed. 4.* Where it is said that if an Arbitrator award that one party shall pay such a sum of money at such a day, and keeps the award in his Pocket till such a day be past, that yet the Obligation shall not be forfeited: And so it was resolved and adjudged by all the other Justices, that the award was good, and Judgement was entred accordingly.

Hillary 7. Jacobi, 1609. *In the Common Bench.*

Foster against Jackson.

**R**ICHARD Foster Plaintiff in *Scire Facias* against Anne Jackson and Myles Jackson Executors of Thomas Jackson, upon Judgement had against the said Thomas in an Action of Debt: The Defendants pleades that the said Thomas Jackson the Testator was taken upon a *Capias ad Satisfaciendum*, awarded upon the sayd Judgement, and in execution for the sayd Debt, by force of the said *Capias*, and there died in execution, and so demands Judgement, &c. And the sole question was, if the said Testator being in execution for the said Debt by force of the said *Capias*, and there dies, if this be satisfaction of the Debt or not.

*Where the death of the Defendant in Execution shall be satisfactory.*

And *Dodridge* the Kings Serjeant which argued for the Plaintiff in the sayd *Scire Facias* conceived that it is no satisfaction, but that notwithstanding the Debt remaines, for the words of the Writ are, *Capias ad Satisfaciendum*, and all others Executions, as *Fire Facias*, and *Eligit* are satisfactory: But the *Capias* is but a restraint of his liberty, till he hath satisfied the Debt, and for that

that it is no plenary satisfaction, but only restraint of his liberty, which the Law more respects then Goods or Lands, and for that *Custodia* ought to be *Salva & Stricta*: So by this the party may be Inforced to pay his Debt *Salva*, to the party, so that by this the party may be safely detained, till he hath satisfied the Debt, and *Stricta* to the King, so that by this Justice may be satisfied, and for that *Bracton* saith; that it is only to compell the party to make satisfaction: And it is resolved in the 33. H. 6. 47. That it is no satisfaction, but that the Body should remain as a Pledge, till satisfaction were made, or as return Irreplevisable, and yet neither the one nor the other are satisfaction: And the words of the Writ are *Capias ad satisfaciendum*, the party, but if he will satisfy then there is no reason that the Defendant shall be Imprisoned by the Writ: But if he will not pay, then he shall continue in Prison, *Quousque satisfecerit*, by which it appears that the Imprisonment is no satisfaction, and it appears also by the Register, and *Fitz. Na. Bre. 246. b* That if a man recover Damages of Trespasse, before the Justices of Oyer and Terminer, and hath the party in execution by force of this Judgement, now if the party which is in execution dies in Prison, he which recovered may sue *Certiorari* to the Justices to remove this Record into the Kings Bench, that the Justices there may make upon that Record, as the Law will in such case: And it seemes by this that the party shall have execution by *Elegit*, or by *Fieri Facias*, for it is not reasonable as it is there sayd, that the death of him which died in Prison, shall be satisfaction to the party which recovered: (but *Fitzh.* here saith, *Tamen quere*, for he doubted of that) but in the Register there is a speciall Writ of *Certiorari* to this purpose, that is to remove the Record into the Kings Bench, so that the Justices may do there upon that, as the Law will, and if the Law will not allow the party to have new execution, it were in vain to have such *Certiorari*, for other course cannot be taken, and the end of every suit is to have payment, and so is the Judgement that the Plaintiff should recover his Debt, and so is the Writ, and the count, and the *Capias* also, and to the end of Justices in *Suum cuique tribuere*: And the party hath not any of these ends, if the death of the Defendant in prison shall be satisfaction, and in the 47. Ed. 3. *Fitz.* execution 41. *Persey* said, that if in Trespasse the Plaintiff recover, and the Defendant is taken for the Kings Fyne, if he pray that the Defendant continue in Prison, till he have made agreement with him, perchance he shall not have *Elegit*, and for that being in Prison, he prayed execution of his Body, and had it, but if the party gets out that he hath no execution, that it is not his default, he shall have *Elegit* after

*Certiorari.*



after, for that, that he cannot have his purpose according to his first election. And if any be in this case, then upon that he inferred that the party in this case may have a *Fieri Facias* against the *Executors*. And also it is resolved by the whole Court in the Common Bench, 29 H. 8. B. Execution 132. That if two are bound in an *Obligation*, *conjunctim & divisim*, the Obligee impleads one, and hath execution of his body, and after impleads the other, and condemns him, hee may have *Execution* against him also, for the taking of the body is good execution, but it is no satisfaction, and therefore he may take the other also: but if he have satisfied the *Plaintiffe*, he shall not have execution afterwards. And therefore this Order, that the *Plaintiff* upon an *Obligation* shall have but one *Execution* is intended such an *Execution*, which is a satisfaction: See 33 H. 6. 48. b. 4 H. 7. 8. 4 Edw. 4. 38. 5 Edw. 4. 4. 5 Coke 92. Blumfelds case, resolved by all the Court, that if the *Defendant* in debt dye in *Execution*, that the *Defendant* shall have new execution by *Elegit* or *Fieri Facias*, for the death of the *Defendant* is the act of God, which shall not turn the *Plaintiff* to prejudice, as it is said in *Trewynyards* case, 38 H. 8. Dyer 60. The *Plaintiff* shall not be prejudiced of his *Execution* by act in Law, which makes no wrong to any. And to the first Objection which may be made against him, that is, That all processe are determined after the party is taken, and in execution; to that he answered, that this is where the *Plaintiff* hath satisfactory execution, as it appears by 41 Edw. 3. 13. where an action of Account was brought against two, one was out-lawed, and the other comes by the Exigent, and enters in the Court; and he which was out-lawed, obtained his charter of pardon, and for that, that processe was determined against him. And the *Plaintiff* hath chosen to have his action against the other, he prayed that he may be discharged. But it was resolved, that the processe was not determined, nor he which was out-lawed shall not be discharged, till the *Plaintiff* be satisfied, by which it appears that the processe is not determined till execution with satisfaction. Two other Objections also he endeavoured to answer, that is, that the *Plaintiff* hath determined his election by taking the *Capias*, and that cannot resort to any other Processe: and to that he agreed, that where the party hath made such election, that he cannot resort to any other Processe, during the life of the party. But if the satisfaction be prevented by the act of God, as in the principall case. But when his person which was the pledg for the debt, and was to remain in prison till the debt be satisfied, is discharged by the act of God, and the *Plaintiff* hath not the fruit of his Suit, nor the Judgement is not satisfied, and the *Plaintiff* hath done all that hee can, and there was no defect in him, it is no reason, but that he may have new processe; and the third objection is a Judgment which was

Outlawry.

given in the Kings Bench, *Pasche* 43. *Eliz. Rot.* 58. between *Williams* and *Curtiz*: And to that he said, that he conceived, that this was a rule for default of prosecution, for the cause was referred to Arbitrement, and so hanged for long time: and so though the Judgment was directly against Law in the principall points, yet for that, that it was not upon solemn argument of the Judges, hee saith it is not to be compared to other authorities by him cyted before, for which he includes, and prayed Judgment for the *Plaintiff*.

*Hutton.*

*Hutton* Serjeant that argued for the *Defendants* conceived the contrary, and first he examined how the body of a man cometh subject and lyable to any *Execution*, and to that he said, that by the Common Law the body was not subject to *Execution* for the debt of any man, but in accompt only a *Capias ad computandum* lyes, and no other proceffe in this action, but distresse infinite till the *Statute of Marlbridge*, Chap. 23. and *West. 2.* Chap. 11. *Capias* was given in Accompt; for by the Common Law, the Proceffe in that was Distresse Infinite as aforesaid, and after by the *Statute* of 25 *Edw. 3.* Chapter 17. Such like Proceffe was given in debt, as in accompt, and before that the body of the *Defendant* was not lyable to execution for debt, if it be not in the Kings case, as it appeares by Sir *William Harberts* case, 12. *a.* And upon this he inferred upon the words of the *Statute* of 25 *Ed. 3.* Chap. 17. which saith, that such like Proceffe shal be in debt, as were in accompt: That after the *Plaintiff* hath determined his election, and taken a *Capias*, that then he is in the same case as if it had been in accompt, and for that he cannot resort to any other Proceffe. And he said that the words of the *Elegit* and *Fieri Facias* do not differ in substance from the words of *Capias*, for there is to satisfie the party, as well as in the other: And when a man hath made his Election to have *Elegit*, he shall not have other Execution. But when the *Defendant* hath neither goods nor Lands, Then *qui non habet in re licet in Corpore*, and the *Plaintiffe* at the first when he hath Judgment hath election to have *Fieri Facias*, *Elegit*, or *Capias*, then he cannot have *fieri facias*; but if he determine his Election at the first, and sue *Elegit* or *Capias*, then he cannot have *fieri facias*, but may first sue *fieri facias*, and after *Elegit* or *Capias*, as it appears by the 15 *H. 7.* 15. 14 *H. 7.* 28. and 7 *H. 6.* 7. But if it be upon *Statute staple*, Then he may have execution for his Body, Goods, and Land together, as it appears by 31 *H. 6.* 47. *Lynnaegres* Case is put in *Blunfelds* case, 5 *Coke* 92. *b.* and 15 *H. 7.* 15. But the reason of this is, that a special Execution by *Statute* is given in this case. And he agreed, that where a Judgement is given against 2 or 3. and the *Plaintiff* sue *Capias* against one of them, by that he hath determined his Election: So that if he dye in Prison or otherwise, he may sue another *Capias* against the others, but he cannot sue *fieri facias*,

or

or *Elegit*, as it appears by 33 H. 6. 47. before; and *Blunfields* case, 5 Coke 92. b. 4 H. 7. 8. And he said that the body is the principall, and becomes chargeable by *statute*: and it appears by 22 *Affss*. 43. That when the party is in Prison, that this is adjudged in Law an *Execution* for the party: and further in the Booke of 33 H. 6. 47. is but the opinion of *Prisot* and *Lacon*: And the principall case there depends upon another point, *Fitz*. 246. before cyted, is but a quere, and *Fitz*. himself doubted of it; and the book of 44 *Edw*. 3. *Fitz*. *Execution*, 41. is but the opinion of *Percye*; But the Judgment upon the principall point is otherwise. And the principall case in *Blunfields* case, 5 *Coke*, was upon another point also, as it appears by the Booke, and so he concluded with the Judgment before cyted to be in the Kings Bench, *Pasche* 43 *Eliz*. between *Williams* and *Cuttris*, which was direct in the point according to his opinion, and prayed Judgment for the *Defendants* in the *Scire Facias*, and it is adjourned.

This Case was argued in *Trinity* Term next ensuing, by all the Judges of the Common Pleas: and first *Foster* the youngest Judge argued, that the death of the *Defendant* in Prison being in *Execution*, was no satisfaction, but the *Plaintiffe* may have a new *execution* against his *Executors*, for he said it was an old saying, *That debts went before deadly sinne*: And that every one ought to satisfie his debts by the Law of God, before Legacies given to charitable uses: And so by the Law of the Realm, if it be not the default of the *Plaintiffe*, as it was not in our Cause; for the death of the *Defendant* in Prison was the act of God, and the *Executors* have confessed by pleading that they have assets, and the *Plaintiff* hath nothing but griefe and pain; and he said as before, that at the Common Law no *Capias* lay, till the *Statutes* of *Marlebridge*, *Chap*. 23. and *Westminster*, the 2. *Chap*. 11. *Capias* was given in Accompt, and then the *statute* of 25 *Edw*. 3. *Chap*. 17. gives such like Procelle in debt which was in Accompt, and then in Accompt *Capias ad Computandum* lyes, and in debt *Capias ad Satisfaciendum*: And if in Accompt the *Defendant* was adjudged to accompt, and *Capias ad Computandum* be awarded, and he taken by force of that, and committed to Prison, and here dyes, a new Writ shall be awarded: So in debt, if the *Defendant* be taken by *Capias ad satisfaciendum*, new Writ shall be awarded against his *Executors*, see 1 *Edw*. 3. 24. 1 H. 7. 5 Coke 92. *Blundfields* case; for it is only the default of the *Defendant*, that the debt is not satisfied, and for that it is no reason that the *Plaintiff* should be prejudiced by that: and 11 H. 4. 44. and 45. by *Skreene*, Debt upon an Escape doth not lye against the Executor of the Sheriff, but new Procelle shall be awarded against the Prisoner which is escaped; for a man shall not take advantage of his own wrong, as in the case of *Littleton*. If the sonn makes disseisin, and enfeoffs the Father, which dyes, the sonne shall

*Foster*.

Debt upon escape against whom.

shall not take advantage of this Discent, because he was *particeps criminis*, and he said it was no wrong to any, if execution were made of the goods of the *Testator*, and it is mischievous to the *Plaintiffe*, for he shall loose his debt: And to the Objections which have been made, that there is an end of Proceſſe when the *Defendant* is taken by *Capias*, and dyes in *Execution*, the which he agreed as long as the *Defendant* lived, but after his death he may make new election, 47 *Ed. 3. Fitz. Execution* 41. by *Percye*. And it appears by the pleading in 17 *Ed. 3.* That Judgment & Execution without satisfaction is no Plea in Bar. And also he cyted the Register, 285. and *Fitz. Na. Bre.* 246. 19. *Ed. 3.* 21 H. 6. 5. where the *Plaintiff* had effectual execution, which was satisfaction, 44 *Ed. 3.* 21 *Edw. 4.* 1 *Edw. 4.* 8 H. 7. 16 H. 7. to the same purpose, for which *Dodridge* cyted them before. And also he said, that the Judges have always had respect to the satisfaction of Debts, and for that would not bayle one in *Execution* upon a Writ of Errour, where Errour indeed was assigned, but suffers him to remain in Prison till the Judgment were reversed, Bar here the *Plaintiff* hath neither Bale nor any satisfaction but griefe and pain: And in the 21 of H. 7. the Sheriff returned, that the *Defendant* had no land, but lands in use, and was adjudged that he should execute the *Elegit* upon these Lands, such was the respect that the Judges have to Executions, and to the Case of 35 H. 6. 47. This is but the opinion of *Lacon*, which erred in the principall case, and may as well erre in this point: and his opinion also is so intricately penned, that he cannot understand it: And *Martins* opinion also in 7 H. 6. 7. is against the Judgment of the principall case. And to the Objection, that the Party had determined his Election by the Execution of the *Capias*, he agreed to that with this difference, that is, if the *Plaintiff* sue *Scire facias*, & the Sheriff levied part, that this notwithstanding the *Plaintiff* may have *Capias* for the residue, and so *Elegit* after *Fieri facias*, or *Capias*, for there is not any Entry made of awarding of *fieri facias*, or *Elegit*: But the *Plaintiff* only sued that out of the Court, see 44 *Edw. 3.* 18 *Ed. 4.* 31 *Ed. 3.* 17 *Ed. 3.* 20 *Ed. 2.* 22 *Affs.* 17 H. 7. 1. And so he concluded that the Judgment shall be given for the *Plaintiff* in the *Scire facias*.

Warburton.

*Warburton* Justice conceived the contrary, that is, that the *Plaintiff* in the *Scire facias* shall be barred: And he agreed and said, that none will deny but that Debts shall be paid, but that ought to be according to the rules of the Law: For by the Common Law the body of the *Defendant* was not lyable to execution, and then it is to examine in what cases he is at this day subject to execution: and though in Trespasse *Capias* lyes at the Common Law, but in Debt no *Capias* lyes till the Statute of 25 *Edw. 3.* which gives the same proceſſe which was in Accompt, and this is as well in the Originall proceſſe,



cesse, as in the Judiciall, and *Elegit* was first given by the *statute of Westmst.* 2. And this was of the half of the Land: But *Levari facias* was at the Common Law of the profits of the Land: That in debt *Acceptance* and *Election* binds the party, and so this remains; for the said *Statutes* being in the affirmative, doth not take away that, nor abate it: and by that if Conusee of a *statute* accepts Land extended at too high a value, he is bound by that, 22 *Edw.* 3. 132 *H.* 6. 15 *H.* 7. And that when the Party hath Judgment, he hath *election* to have execution by *Fieri facias*, *Elegit*, or *Capias*, for he hath determined his Election. So if he makes his Election of a *Capias* at first, he cannot have *Elegit* after, 30 *Edw.* 3. adjudged 32 *Edw.* 3. *Processe* 52. according, Long 5 of *Edw.* 4. by *Markeham* and others, and the reason which is given in 47 *Edw.* 3. 17 *Edw.* 4. and 21 *H.* 7. that have been remembred to the contrary is only, that it is reason that the *Plaintiff* should have the same *processe*: which was at the Common Law, and there was not any such *processe* as *Capias* in debt at the Common Law, and 21 *H.* 7. may be understood that the *Elegit* was not returned, and so no record of that. And 50 *Edw.* 3. a man may recover in Debt, and pray *Elegit*, and after brings Debt upon the Record, but it doth not lye. And he agreed to the Book of 23 *H.* 6. For there the *Defendant* was bound in an Obligation to make satisfaction of Debt, and hee dyed in Prison, and this cannot be satisfaction according to the Condition. And in the Case of *Fitz. Nat. Brev.* the same doubt of that, and this was the more strong case then the case at the Barr: and if he doubted of that, is the cause that he doubts also. And cyted *Williams* and *Cutis* case, *Ror.* 88. in the point, where the reason of the Judgment was for that, that the *Plaintiff* had his plain and full satisfaction, and saith that it was apparent difference between that and *Blunfields* case, for there was 2 *Defendants*: and here if one dyes, there shall be no satisfaction, and so these reconciled. And so if a man be taken upon a *Statute Merchant*, and dyes in execution, that shall not be satisfaction, for this is speciall *processe* given by *statutes*. And 14 *H.* 7. 1. If a man being in Execution escape, he shall not be taken againe: and in the 14 *H.* 7. in debt upon an Obligation *Capias pro fine* was awarded, and the *Defendant* taken by that. And the *Plaintiff* prayed that he might be in Execution for his debt also, and could not, for that he had sued *Fieri facias*, and it doth not appear if the Sheriff have that executed or not. And so he concluded that the Judgment should not be revived by the *Scire facias* against the *Executors*, and that Judgment shall be given for the *Defendants* in the *Scire facias*.

*Walmesley* Justice accordingly. He specially observed the forme of the Writ which suggests, *quod executio adhuc restat facienda*, &c. And to that the *Defendants* in the *Scire facias* plead that *Capias* was awarded

Land extended  
at too high  
rate.

*Walmesley.*



awarded at the suit of the *Plaintiff*, and upon that the *Defendant* was taken in *execution* and there dyed, by which it appears that the words and suggestion of the Writ was answered directly, and upon that he strongly relyed, and then said that there were 3 ways to have Execution, that is, by *Fieri facias*, *Capias*, and *Elegit*: And there is a speciall order to be observed in the suing of that; for a man may have *Fieri facias*, and if the *Defendant* have not goods, may have *Elegit*, or *Capias*: But if he make his Election to have *Capias*, he cannot have *Fieri facias*, nor *Elegit*, or if he sue *Elegit*, he cannot have a *Fieri facias*, nor *Capias*: In 33 H. 6. and 44 Edw. 3. which have been cyted, the *Plaintiff* sues *Elegit*, and after that would have sued *Capias*, supposing that he had not accepted the *Elegit*; but of the other part it was said, that the Sheriff had made Execution of it, the which he could not contradict it. And if the *Plaintiff* had *Fieri facias*, and goods delivered to him in Execution, and the Writ returned, he shall not have a second Execution: and so if *Elegit* executed and returned, 14 H. 7. 15 H. 7. and said that Executions are tickle things; for if the party escape, he delivers himselfe out of Execution, and the *Plaintiff* shall not have other Execution against him, for that he hath had one Execution, 2 Edw. 4. And so if a man sues a Writ of Priviledg out of *Parliament*, and by that is delivered out of Execution, he shall not be taken again. And so if a man be delivered upon a Writ of Error, for when the Party hath made his Election to take *processe* against the body, it was his folly that he made such Election; for though that death be the act of God, yet for that, that *statutum est omnibus semel mori*, and for that God hath done no wrong, for he hath but performed his Eternall Decree, and for that it is not the act of God only, but the folly of the party to make such Election, and the Book of 47 Edw. 3. by *Percy* is but his opinion, and more other Books are against that, and 3 H. 6. *Danby* and *Prisot* are against *Lacon*: and though that the death of the Party in Execution is no satisfaction in *rei veritate*, yet in Law it is satisfaction, for that that the party hath no other remedy, the Writ in the Register is *certiorari ad faciendum in omnia & singula que secundum legem & consuetudinem fieri*, &c. And there is not any Law nor Custome to warrant any such Course, and here is not any other proceedings upon it. But if he may have a Writ of *Scire facias ostensus quare satisfactionem habere non debet*, then it may be that the *Defendant's* ought to give another answer, but for that, that there is not any such Writ, it seems that Judgment shall be given for the *Defendants*.

Coke.

Coke chief Justice seemed the contrary, and he agreed with *Foster*, and he said, that it is *vexata et spinosa questio*, for the Books vary, and great arguments have been made of both parts. There are three things considerable.

1. *Reasons*,

1. *Reasons.*2. *Authorities.*3. *Answers of Objections.*

And for the *Reasons*: First, he considered in whom the default is for which the Plaintiff shall lose his Debt.

2. That the Debt remains after the body is taken in Execution.
3. If the body taken in Execution be satisfaction.
4. If the dying in Execution be a discharge.
5. The Mischiefs, if so they shall be.

*And to the Objections.*

First, *Escape*, which is the wrong and act of the Party, it is no satisfaction nor discharge, and here is the act of God, and election of the party.

2. *Execution by Elegit*, If Lands be extended upon that, this is no satisfaction. And so if he be delivered by a Writ of Error, and so in this case.

And for the first, the fault was in Jackson, for he did not keep his day in the Condition, and upon this was sued, then he pleaded a false plea, and upon that Judgment was given against him, in all which actions the default was in the Defendant, and no default in the Plaintiff, for he took the Body which is the visible execution, not in satisfaction, but to satisfy, and the Defendants have not pleaded fully administered, but confesse that they have *Assets*, and there is more reason that the Plaintiff shall be satisfied, then the Executors keep the goods to their own use; for it is *Summa Injustitia nocentem habere totum lucrum, & innocentem totum damnum*.

Second reason was, that it is no satisfaction for the Defendant to dye in Prison, and agreed that if 2 *Precipes* are contained in one Originall, there shall be but one satisfaction. But if one be taken by *Capias*, and remains in Execution, *Capias* shall be awarded against the other, and he shall remain in Prison till satisfaction be had, for execution is no satisfaction, as it is said in 29 H. 8. b. Execution 132. adjudged: See 4 Ed. 4. 38. 5 Ed. 4. 4 H. 7. 8. And Hillaries case, 33 H. 6.

And to the third, that is, that the Debt remains after the taking of the body in execution, and agreed that when execution is made of goods or lands, no Debt remains, but otherwise it is of execution of the Body, as it appears by 29 H. 8. before cyted, B. Execution 132. and 41 Affs. 13. where a man was condemned in Damages in Trespas, and committed to Prison by *Capias*, and escaped, the Gaoler dyed, the Plaintiff prayed debt against his Executors, and could not have it, for they are not charged without specialty: and the Plaintiff alledged that the Defendant was vagrant in the County of M. and prays *Capias* to the Sheriff of M. to take him, and it was granted,

granted, for his remedy against the Sheriff was determined, and this proves also, that the Debt remains after escape, & *scire facias* is, *licet Judicium redditum sit, tamen executio restat ad huc facienda de debito*, for the body is but as a pledge, & the form of the Writ in the Register *Capias ad satisfaciendum*; and not in satisfaction, which proves that there is no satisfaction, but upon the payment of the money his body shall be delivered out of Prison, & this is execution with satisfaction, for there are two Executions; that is, *Medius & finalis*, the first is the *Capias*, the second *Satisfaction*, which is *Ultimus Finis*: And it is a good rule, *quod nihil videtur factum, ubi aliquid restat faciendum*; and here is *aliquid faciendum*, that is, *Satisfaction*, for in all acts there is a beginning, progression, and consummation, & Consummation in this case fails, *Mors est horrendum divortium*, which is the act of God. And when the act of God hath delivered him which lyes in prison for his own default; it is no reason that the Plaintiff should be prejudiced, 43 Ed. 3. 27. A man enfeoffs the Father with Warranty, which enfeoffs an estranger which enfeoffs the son: the father dyes, the son may vouch, for it is the act of God: And to the Mischiefs, *nec crudelis creditor, nec delicatus debitor sunt audiendi*, for they play at Bowls, and keep Hospitality in the Prison: Or if a man be arrested, and makes a tumult, and is slain in endeavouring to break the Prison, and breaks his Neck, it is no reason that he by such act should defraud the Plaintiff of his Debt, the opinions against him are coupled with absurdities, as 7 H. 6. 8. *Martins* opinion is also imparted with absurdity, 33 H. 6. 48. The opinion of *Lacon* is also coupled with another absurdity: and 22 Assf. b. Execution is also coupled with absurdity, that is, if the Defendant escape, this determines the debt, and is satisfaction: and 15 Edm. 3. *Quare Impedit*, 174. in Writ of Right of Advowson, the Plaintiff hath Judgment, and *habere facias sefinam* in the life time of the Incumbent, and after his death sues *Scire Facias*, the first is Execution, but not with satisfaction; and the last is satisfaction, for by this he hath the fruit of his Judgment: So 19 Ed. 3. Execution: and 22 a younger *statute* is extended, and *Liberate* sued, executed, and returned: And after an elder *statute* is extended, and after satisfaction of that, he that hath the youngest may sue *Scire Facias*, and have execution of the youngest: So of Beasts distrained, and put into the Pound, and thre dyc, he which distrayned, may distrayn again, for this is no satisfaction of his Rent, 14 H. 4. 4. 15 Edm. 4. 101. 11 Eliz. Dyer 280. And so *Capias ad computandum* is not Accompt, nor *Capias ad quietandum*, Acquital, Register, 30. 39. 285. And it is said in *Bract*, lib. 7. Chap. 17. *Sunt brevia Magistralia & formata*, the first are made by Masters of the Chancery, the others which are Original by Curitors, which are founded by acts of Parliament, and cannot be changed

changed without *Parliament*; and as *Fitzherbert* in his Preface to his *Na. Bre.* saith, that every Art and Science hath certain Rules and Foundations, to which a man ought to give faith & credence, and the Writ of *Fieri facias* being founded upon a *Statute*, and the form, that *executio adhuc restat facienda*: he saith that this was the Judgment of the *Parliament*, that the first Execution was not Satisfaction. But as the Writ is also in the *Register*, 245. That where a man is condemned in *Trespasse*, and committed to prison, *detinendum quousque*, he satisfies the party, by this it appears that he is but a pledge: And *Fitz. Na. Bre.* 63. 65. 67. and *Register*, If a man be taken by *Capias Excommunicatum*, ad satisfaciendum & parendum *Clavibus Ecclesie*, and is delivered by Writ, which issues *improvide*, another Writ of *Capias* shall be awarded. And to the matter of Election he agreed; that if *Elegit* were awarded, the party cannot have *Fieri facias*, nor *Capias*, for there is Entry made, *quod Elegit sibi executionem de meditare*. But when *Fieri facias* or *Capias* is awarded, no entry at all is made. But if any of them are returned executed, then he cannot resort to another Proesse; and with this difference agrees all the Books of 15 H. 7. 15. 21 H. 7. 19. 30 Ed. 3. 24. 31 Edm. 3. Proesse 52. 19 H. 6. 4. 34 H. 6. 20. 45 Edm. 3. 19. 50 Edm. 3. 4. and 5. 18 Edm. 4. 11. 20 Edm. 4. 13. 11 Eliz. *Dyer*, 296. And to the case of *Williams* and *Cuttrys*, cyted to be adjudged, 43 Eliz. the which he cyted as *Lamb's* case, he said in this was many apparent Errors in forme of pleading, so that the matter in Law cannot come to Judgment, 35 H. 6. *Prisor* seemed that by the law of God the Imprisonment of the body of a man was no satisfaction, for by that the Creditor may sell his Debror and his Children for the payment of his Debts, *Matth.* chap. 18 vers. 24. 4 *Kings* 4 Chap. vers. 1. *Matth.* chap. 5. *Luke* chap. 12. And so he agreed with *Foster* in opinion, and concluded, that the death of the Defendant in the action of Debt was no satisfaction, nor determination of the Proesse, nor of the election, But that the Plaintiff may have new Execution against the Executors, and by consequence that Judgment shall be given for the Plaintiff in the *Scire facias*, but no Judgment was given for that, there was equality of opinions, that is, *Coke* and *Foster* against *Walmesley* and *Warburton*; *Danyel* being dead, and for that it was adjourned.

T. H. Chalke



*Case* 8. Jacobi 1610. See *Hillary* 7. Jacobi the beginning.

Chalke against peter.

Harris.

**T**His Case was argued this Tearme by *Harris* youngest Serjeant for the Defendants, and by *Haughton* for the Plaintiffs: And Serjeant *Harris* conceived that Sir *Francis Barrington* was within the Intent of the Act of 21. Ed. 4. chap. 17. For he hath grant of Trees of Inheritance, and this was all the profit which rise upon the Soyl, and for that it shall be intended of the Soyl it selfe: And to prove that, he cyted *Parvomer and Yardhes Case* in the Com. 342. and 343. 2. H. 8. 139. *Crooke*, 11. Eliz. Dyer 285. Where it is agreed by three Justices, that the Patentee or Grantee of Herbage in a Forrest shall have Trespasse against any which consumes and destroyes the Grasse, but not the Trees, nor of the fruit of that; and the Trespasse of that shall be *Quare clausum fregit*, as well as if it were of Land: And may inclose the Forrest by such Grant: See 17. Ed. 4. 6. a. by *Littleton* that *Vestura terre* doth not pass without Livery: Also admitting that he is not owner of the Ground within the Statute, yet it seemes by the Statutes that they are: It shall be lawfull for the same Subjects, Owners, &c. And to such other persons to whom such VVood shall happen to be sold: Immediately after the VVood so cut, to fence and inclose the same Ground with sufficient Hedges able to keep out, &c. Upon which words he inferred, that *S. Francis Barrington* is such a Person to whom the VVood is sold, and for that may inclose: And also he conceived, that the Statute is generall, and concernes all persons in generall: and also all Forrests and Chases whatsoever: And for that it is not like to the Cases, put in *Hollands Case*, 4. Coke upon the Statute of 13. Eliz. VVhich concernes all Ecclesiasticall persons in generall, that this is a generall Act, and yet concernes but one Genus in particular: But the Statute of 1. Eliz. Is otherwise, which concernes the Bishop, which is but a species of this Genus, as it is resolved in *Elmers Case*, 5. of Coke: And also he conceived that it shall be relieved by the Statute of 35. H. 8. And so prayed Judgement for the Defendant.

Haughton.

And *Haughton* conceived, that the words of the Statute intend such a person to whom VVood is sold, for one turne only: And not he which hath Inheritance of Wood: & that there is no word in the Statute to exclude Commoner, and such a Vendee is not without remedy, for he is within the Statute of 35. H. 8. If he pursue his remedy according to the Statute, and so prayed Judgement for the Plaintiff.

And



And at another day *Foster Justice* argued, that the Plaintiff in the Replegiare shall recover, and said that the cause consists of three parts.

*Foster Justice.*

First, the Arbitrement.

Secondly, the assurance.

Thirdly, the private Act of Parliament, of 27.H.8. And to those the Arbitrement and the assurance shall tye only those which are parties to it, and no others, and the Commoner is not party to that nor shall not be bound, and the private Act confirms the assurance, saving the Right of all strangers, by which the Commoner is exempted, and also the *statute* is made only as confirmation of the Grant, and for that it shall not extend to any other thing, nor to other parties, but those only which are parties to the Grant, as if the Queen had made a voydable Patent, and after had made a Lease for yeares, and after by the *statute* of 18.Eliz. All *Letters Patents* made within such a time were confirmed, this makes the *Letters Patents* good, against the Queen, but against the Lessee: And also all the Covenants in the Grant, extend only to the Lord Rich and his Heires, and these which claim under him: And for that it shall not extend to the Commoner, and also the private Act saves the Right of all strangers, by which the Right of the Commoner was saved: And he conceived, that the Commoner shall not be excluded by the *statute* of 22. Ed.4. chap. 7. which recites, that if any Subjects have any Woods growing in his own Ground, within any Forrest, Chase, &c. Shall cut the same VVood by lycense of the King or his Heires, in Forrest, Chases, &c. Or without lycense in the Forrest, Chase, &c. of any other person, or make any Sale of the same VVoods: It shall be lawfull to the same Owners of the same Ground, whereupon the VVood so cut did grow, and to other such persons to whom the said Wood shall happen to be sold Immediately, &c. to cut and inclose the same Ground, with sufficient hedges, able to hold out all manner of Cattell and Beasts, and to continue the same by the space of seven yeares, without suing of any other Lycense, of him or of his Heires, or of any other persons, or of any their Officers of the same Forrest, Chases, &c. By which words it appears, that the *statute* doth not extend to any Wood of the King, but only to the Wood of the subject lying in Forrest of the King, or of other person owner of the Forrest, or Chase: And if it be in the Kings case, and he hath lycense from the King to cut the Wood, then may he cut it without other lycense, according to the perclose of the Act: And the *statute* doth not give lycense to Inclose, without the assent of the Commoner, but without other lycense of other Officers of the Forrest: And by this Statute the Owner of the Ground, may first cut the Wood, and then Inclose: But by the Sta-

Warburton.

tute of 35. H. 8. Otherwise it is, for by this he may first inclose, and then cut within four Moneths; and that Sir Francis Barrington hath no interest in the Soyle, and that this Statute of 22. Ed. 4. is a private Statute and ought to be pleaded, for it concerns only forrests and Chafes, and it is no other, then if it had been of al Woods in Parks, and resembled that to the statute of 1. Eliz. of the Bishop, which concerns only the Bishop, and it is resolved in *Elmers* case to be private; and the same Judges shal not take notice of that without pleading, and it is not like the statute of 13. Eliz. which concerns al manner of spiritual persons in general, and also that this statute is repealed by the statute of 35. H. 8. which is a negative Law, and *Leges posteriores priores contrarius abrogant*, and it is agreed in *Porters* case 1. Coke, and so he concluded that Judgment should be given for the Plaintiff. Warburton Justice to the contrary, and yet he agreed that neither the Arbitrement, nor the conveyance, nor the private act, excludes the Commoners for these reasons, which have been urged by *Foster*; but he relyed only upon the statute of 22. Ed. 4. and to that he sayd that the statute gives power to the owner of Ground to inclose, and it should be frivolous for him to inclose, if the Commoner shal not be by that excluded, and he said that the persons mentioned in the statute are two.

The first is the owner of the ground, and such person he agreed Sir Francis Barrington is not.

The second is such person to whom such wood shal happen to be sold, and such Person it seems, is Sir Francis Barrington, and yet he agreed that he hath an Inheritance in the Trees, and the Owner of the soyl cannot cut them, nor dig the soyl from the Roots of the Trees, for then the Grant could not take effect, and he sayd there is no difference between sales of Wood, though that the statute speaks of the Person to whom Wood shall be sold, and another person to whom it shal be given without consideration, and to that he resembled the statute *Westminster* 2. Chap. *Si quis alienavit terram uxoris sue, non deferratur, &c. sed expectet emptor, &c.* though that the statute mention buyer only; yet Donee without any consideration shal be intended in it, and that the statute doth not intend within it, and that the Statute doth not intend sale *Vinca vice tantum*, but rather sale of Inheritance, for such Vendee may rather intend the preservation of the wood then the other: And he inferred upon these words of the statute, to inclose the same Grounds with hedges sufficient to keep out al manner of Cattel and beasts out of the same Grounds, and these words expound themselves, for they shal not be intended Deer, but Cattel which belong to Commoners, and so is the statute of *West.* 2. Chap. If Infant suffer Usurpation, this shal not bind him, but this shal be intended, where he hath Advowson by descent

discent and not by purchase, and this appears by the words of the *statute*, which are, *Cum aliquis vis presentandi non habens presentavit ad aliquam ecclesiam, cujus presentatus sit admissus, ipse qui verus est patronus, per nullum aliud breve recuperare potuit advocacionem, quam per breve de re, quod debet perminare per duellum vel per magnam assisam per quod heredes infra etatem existentes per fraudem & negligentiam custodis multas ex hereditatem patiebantur, &c.* By which words it appears, that there ought to be presentation which passeth by fraud and negligence of the Guardian, which the *Statute* remedies, and that is presentation which he had by discent, and not by purchase, and in the Time of *Ed. 1. Fitz. trespass* 239. It is said, the Law of the Chase, that none may inclose his own Wood, without the view of the Forrester, and if the *Statute* of 22 *Ed. 4.* Gives licenle to inclose, and that notwithstanding the Commoner may put in his Beasts, then is the *statute* made in vain; and it is resolved in the 30 of *Ed. 3. Fitz. trespass*, that if a man hunt in a Park or Chase, that this is not within the *statute* of *Westminster 1. Chap. 21 Ed. 1.* So the *statute* of 22 *Ed. 4.* Extends to the Kings Deere, and also to other Beasts, which shal be intended the Cattel of the Commoners, and it is not repealed by the *statute* 35. *H. 8.* For these *statutes* are made for several purposes, and consist upon several grounds, and if the *statute* of 22 *Edw. 4.* be repealed, then there cannot be inclosure for forrest or Chase at al: And which is general Law, and the Justices ought to take notice of that without pleading, and that al Lawes to some respects may be intended to be special as the *statute* of 13 *Eliz.* Concerns only spiritual men, and so *Charta de foresta*, concerns only forrests, and the *statute* of 3 *H. 7. Chap. 1.* Gives appeale to the Wife for the death of her Husband, and though that al these *statutes* concern one thing only, and for that to some intent may be said to be special, yet they are al generall Laws, and so he concluded that Judgment shal be given for the Defendant.

*Walmesley* agreed with *Foster* in al, that is, that Sir Francis *Barrington* hath nothing but profit, *In alieno solo*, and for this cause was not within the *statute* of 22 *Ed. 4.* Which might inclose, and the Common Law doth not exclude the Commoner, for the Lord *Rich* granted the Wood, and this *Transit cum onere*, to Sir *Thomas Barrington*, and sayd, that it was in vain to dispute if the *statute* of 22 *Ed. 4.* was private Law, or if it were repealed, which makes nothing in the Case, and so he breisly concluded that Judgment shal be given for the Commoner, which is the Plaintiff.

*Coke* cheife Justice agreed, that Judgment shal be given for the Plaintiff, and did agree that the Arbitrement, the Convaiance, nor the private Act made nothing in the Case, for by these the Commoner cannot be barred of his Common; but for the *statute* of 22 *Ed. 4.*

He

*Charta de Foresta.*

He would first consider how the Law was before the making of that, and as to that it appears by the *statute* of *Charta de foresta*, that by the Common Law, no man which was Owner of Wood in which another had Common; that they could not inclose, but *Affise* of Common or action upon the case lyeth, as it requires, and if it be several Wood within the Kings Forreſt, in which none hath interest of Common; then may he inclose by the view of the Forreſters, and this hold inclosed by the space of three years, as it appears by the *Preamble of the Statute* of 22. Ed. 4. *Cum parvo fossato & bassahia*, that is a Little Ditch, and Low Hedge, for that the Kings Deare are not shut out; and this appears in the Register, in the Writ of, *Ad quod damnum*, *Fitz. Na. Bre.* 226. f. And then comes the *statute* of 22 Ed. 4. and gives power to inclose with such sufficient Hedges able to keep out al manner of Beasts and Cattel. And then considered between what persons the *statute* is made: And to that he conceived it is made between the King and his Successors of one part, and Subjects having woods growing upon their owne Grounds, and such persons unto whom such woods shal happen to be sold of the other part; and a Commoner is not named in the *statute*, and also the Body of the *statute* is not general, but there are some words in one sentence, and this is but a sentence and cannot be divided; the words are,

First, The sayd Hedges so made, may keep, &c.

Secondly, And repaire and maintain them, as often as need shal be, within seven years.

Thirdly, without suing any other License of him (that is the King) or his Heirs or other persons (that is, which have forreſts or Chases) or any of their Officers, and here the sentence concludes, and there is no period before them, so that this *statute* being made between the King and owners of forreſts and Chases of one part, and Owners of woods in their own soyl, and other persons to whom such woods should be sold other part, this shall not extend to other persons, Commoners, and it is like to the case in 9 *Eliz. Dyer* 257. 13. A man makes a Lease for years, and covenants that the Lessee shal injoy the Term without eviction of the Lessor, or any claiming under him, if he be evicted by a stranger, this shal be no breaking of the Covenant, for a stranger is no party to the Deed, nor claims under the Lessor, and for this his Entry shal not give Action to the Lessee, and so is the Case in 21 H. 7. between the Prior of *Castleton* and the Dean of *Saint Stephens*, which was adjudged the 18 of H. 7. *Pasch. Ret.* 416. Though that no Judgment be reported, where it appears that the King *Ed.* 3. seised al the Lands of Priors aliens, in time of War, for that that they carried the Treasure of the King out of the Realme to the Kings Enemies, and so it was made by H. 4. also during the time of his Reign, and then in the second year of the



the Reign of King H. 5. by a *statute* made between the King, and the sayd Priors aliens, al the Possessions of the sayd Priors were resumed into the hands of the sayd King, and adjudged in 21. H. 7. 1. before that this shal not extend to the Prior of *Castleton*, which had Annuities issuing out of the Possessions of the sayd Priors, for the said Prior of *Castleton* was not party to the sayd act of Parliament, and for that he shal not be prejudiced by that, and so it was adjudged, 25. and 26. Eliz. In the Court of VVards in the case of one *Beswell*, where the King made a Lease for years which was voydable, and after by another Patent granted the Inheritance, and then came the *statute* of 18. Eliz. to confirm al Patents made by the sayd Queen within her time, and adjudged that the sayd Act shal not make the sayd patent voyd to the Patentee, which is a stranger to the act of the Parliament, but only against the Queen, her Heirs and successors, for by the *statute* it is made only against one person only, and shal not be good against another, though there be no saving of such person in the sayd Act. And also he conceived that the statute of 22 Ed. 4. Doth not extend to any woods in forrest, in which another hath Common, for it doth not extend only to such woods which a common person hath in the Kings forrest, or common person, and that it may be inclosed for the space of three years after the cutting of the wood in this, before the making of the sayd *statute*, and this was no wood in which an Estranger had Common, as it appears by the *Preamble* of the sayd *statute*; and then after in the sayd *statute* it is sayd, such woods may be inclosed.

And also he conceived where the *statute* sayth, that they may inclose the same Grounds, with such sufficient hedges, able to keep out all manner of Beasts and Cattell out of the same Grounds, but this refers to the quality of the hedge, for before it ought to be a small Ditch, and by this *statute* it ought to be with such hedg which shall be able, &c. And it shall not be referred to the manner of the Cattell: But for the difference between Beasts of Forrest, Beasts of Chase, and Beasts of Warrain, see the Register, fol. 96. 43 Ed. 3. 13. 12. H. 8. 12. b. *Hollinsheads Cronicle*, fol. 20. b. 32. And he conceived that Sir *Francis Barrington* is such a Vendee of Wood, that is within the *statute*, though that he be Vendee of Inheritance, and hath a greater Estate then *Unica vice*, but for that, that he conceived that it was not within the *statute* for other reasons before cyted, he would not dispute it: But he conceived if this had been the question of the Case, that this was within the statute, and also he conceived that this was a generall *statute*, of which the Judges shall take notice without pleading of this; And this reason was, for that that the King was party to it, and this which concernes the King, being the head, concernes all the Body and Common Wealth, and



and so it was adjudged in the Chancery in the case of Serjeant Heale, that the statute by which the Prince is created Prince of Wales was a general statute, and for that see the Lord Barkleyes case in the *Commentaries*: Also he conceived, that the said statute of 22 of Ed. 4. was repealed by 35. H. 8. for this was in the Negative, that none shal cut any wood, but only in such manner as is prescribed by the said statute, and for that shal be a repeal of the first, and that by the first Branch of the sayd statute it appeares, that if such giving of Wood in his own Soyl within any forrest, he cut to his own use, he cannot inclose, and by that Branch Commoner is not excluded, but by the second Branch it is provided, that he may inclose the fourth part of his Wood, and cut that in such manner as is appointed by the said statute, and then he shal loose his own Common, in the three other parts, and so he concluded that Judgment ought to be given for the Plaintiff, which is the Commoner, and Judgment was entred accordingly.

*Pasch. 1610. 8. Jacobi, in the Common Bench.*

Cesar against Bull.

*Affise Office.*

**T**HE *Thomas Cesar Plaintiff in Affise against Emanuel Bull*, for the Office of Clock-Keeper to the Prince, & this he claims by grant of the King during his own Life, with the fee of two shillings a day for the exercising of it, and three pound yearly for Livery, and the patent purports only the Grant of the Office, and not words of creation of the Office, as *Constituimus officium, &c.* And the Plaintiff could prove that it was an ancient Office, and for that was non-suited in the *Affise*, though that the Tenant had made default before.

*Pasch. 1610. 8. Jacobi, In the Common Bench.*

Heyden against Smith and others.

*Trespasse.*

**T**HE *Plaintiff* counts in *Trespasse* against these Defendants, and these Defendants justifie as Servants to Sir John Leventhorp, who was seised of a free-hold of Land, in which the Tree, for which the action was brought, was cut, and so demands Judgment if action, the *Plaintiff* replies, that the place where, &c. was parcel of a house and twenty Acres of Land, which time out of mind, &c. have been demised and demisable by Copy of Court Roll, which was parcel of the Mannor of *A.* of which the sayd Sir John Leventhorp was seised in his Demesne as of fee, and by Copy at a Court held such a day

day and year granted the said Messuage and twenty acres of Land, whereof, &c. To the Plaintiff and his Heirs, according to the custome of the said Mannor, and prescribes that within the sayd mannor was a Custome that every Copy-holder may cut the boughs of all the Pollingers and Husbands growing upon his Copy-hold for fire to be burnt upon his Tenement, and also prescribed for House-boor, Plow-boor, and Cart-boore, and averred that he had nourished the growing of the Trees upon his sayd Copy-hold, and that the sayd Messuage and buildings, upon that were ruinous, and the Trees growing upon that twenty Acres of Land were not sufficient for the repairing of it, and so demanded Judgment if he should be debarred of his Action, upon which these Defendants demurred in Law, and it was adjudged by *Coke, Warburton, and Foster, Daniel being absent*, that the Action was wel maintainable; against *Walmesley* who objected, that if a Copy-holder may cut Trees, as it was here pleaded at his pleasure, without pleading first, that his House was in decay and ruinous, and that then he cut trees for the repaire of that, that then he hath an Estate at wil according to the Custome, and not at the Wil of the Lord, and he sayd that he could not cut a tree, and imploy that for Reparations twenty years: But the cause of this cutting, which is the Ruines, ought to precede the cutting; and he sayd that such Copy-holder hath no property in the Trees, by such prescription, no more then he which hath Common of Estovers, or tenant at wil, and if he cut a tree without special custome, he shal be punished in trespassse, as *Littleton* saith of Tenant at Wil, and also he ought to plead how the House was ruinous, and what place and what part of that was in decay, and then that this so being in decay, that he cut trees for the repaires of that, and also that the Prescription to cut off the boughs, *Pro ligno combustibili*, is not wel pleaded, for by that he may cut all the timber and others also, and he who prescribes to hate Estovers, ought to prescribe to have reasonable Estovers for Fuell, and the averment that all the trees are not sufficient for reparations is surplusage, and so hee conceived that the Action for these causes is not maintainable, that is, that it is not maintainable, without speciall custome, and that the custome as it is pleaded here is voyd, but it was answered and resolved, by *Coke* and the other Justices before cited, that the Action was wel maintainable at the Common Law without such Custome, and that the pleading of the custome was surplusage, for it was agreed that the Copy-holder hath special property, and the Lord a general property: and it was sayd by *Coke* and *Foster*, that the Lord may as wel subvert the Houses as cut down the Trees, for without them the Copy-holder hath no means to repaire that, and for that if the Lord cut the Trees, the Copy-holder may take them for repaire of his house,

Estovers.

Boote, its signi-  
fication, &c.

for the Copy-holder hath as large an Estate in the *trees*, as in his Copy-hold Land, and it was resolved that the Prescription was very well pleaded, inasmuch that the Copy-holder pleads that as a custome, and also that prescription, *Pro ligno combustibili* is Good, and this is an apt word by which he may claim it, and that boote in any sense is maintainable, and in some sense is Recompence or Reparation, and it is House-boote, Hedge-boote, Fire-boote, Plow-boote, &c. Is in it self a Saxon word, and the Lord Coke sayd, that it was adjudged *Michaelmas* 25. and 26. *Eliz.* in *Doylles Case*, Where it was a custome that the Copy-holder might cut *Merisme* for to re-paire, that if the Lord carry it away, that an Action of Trespass lies for the Tenant, and *Pasch.* 36. *Eliz.* *Taylers Case*: A man was Tenant by copy of Court Role of wood, and the soyle was excepted to the Lord, and yet the Copy-holder maintained an Action of trespass against his Lord for cutting of wood, And *Trinity* 4. *Eliz.* *Stebbing's Case*, Copy-holder prescribes to have the Loppings of all the *trees* growing upon the Copy-hold, and the Lord cut a *tree* himselfe, and the Copy-holder brought an action upon his case, and adjudged that it lyeth wel, and 9 *H.* 4. *Fitz. Waste* 59. by *Hull*, that Tenant by copy of Court Roll cannot make waste, nor cut woods to sel, but for his Benefit in repairing of his House, and 2 *Henr.* 4. 12. *a.* It seemes that if a stranger cut a *Tree*, the Lord may have an Action of trespass, and the Copy-holder another, and every one of these shall recover Damages according to his interest, that is, the Lord by his general property, and the Copy-holder for his special property; & it appears by *Clark and Pennyfathers case* 4 *Coke* 23. *b.* That the Heir of the Copy-holder, may have an Action of Trespass, before admission, by which it appears that the heir doth not take his Estate of the Lord but of his Father: and also agree, that if such an Heir dye before Admission, the Heir may enter, and take the profits, and so it was adjudged that the Action of Trespass brought by the Copy-holder against his Lord was well maintainable.

*Pasche* 1610. 8. *Jacobi*, In the *Common Bench*.

*Earle of Rutlands Case.*

**E**ARLE of Rutland Plaintiff in an Action of trespassse upon the Case against *Spencer and Woodward Defendants*, the case was, The last *Queen Elizabeth Anno* 42. *Eliz.* by her Letters Patents under the great seale of England, granted to the Earle of Rutland the Office of the custody of the Porter-ship of the Castle of Nottingham, *Habendum* to the sayd Earl to be executed by him or his Deputy during his natural Life, and further the same *Queen*, by the same Letters

*Letters Patents*, granted to the sayd Earl, the Office of *Stewardship* of diverse Mannors, *Habendum & exercendum, cum omnibus feodis, vadis & proficuijs eidem Officio pertinentibus*, to the sayd Earl, from the time that he should be of full age, during his Life, and further the sayd *Queen* granted to the sayd Earle the Office of *Keeper-ship* of divers Parks and forrests, *Habendum & exercendum Officium predictum cum omnibus & singulis suis proficuijs, vadis, feodis, & emolumentis, quibuscunque, eidem Officio pertinentibus, aut ratione ejusdem percipiendis per se vel sufficientem deputatum suum, &c.* And after in the sayd Patent it is recyted, that the sayd Earl was of full age *An & 40 Eliz. Ut informamus, & mandamus quod omnes & singuli Officiarii, & alij quicunque sint intendentes & obedientes dicto Committi, & deputatis suis, in exerendo officium predictum*, and if this patent were good or not was the question.

And *Hutton* serjeant conceived, that the Patent was good, and that the sayd Earl may exercise the sayd Office of *Stewardship*, for which this Action was brought, by Deputy by force of the sayd Grant.

The first question, which hee moved was, if *Steward* of a Court may excise his Office by Deputy, without speciall Grant of that.

Secondly, if there be words within the Patent, to enable him to execute that by Deputy.

Thirdly, if upon this disturbance, action upon the case, *Quare vi & armis*, lies.

And to the first, he conceived, that the *Patentee* may exercise the Office by Deputy without special words of Deputation in the Patent, for he conceived that it is not meerly an Office of trust, for he hath not the keeping of any Records, for the Courts of which he was steward were not Courts of Record, and yet that all the Books are, that ancient grants of Office of stewardship, contain that the *Patentee* may exercise, *Per se, vel per sufficientem deputatum suum*, though they are not of Courts in which the steward is Judge, but the suitors, but if a Grant be of such an Office of Inheritance, then there needs words of *Deputatum*, for here it is apparent, that there was not special trust reposed in the *Patentee*: And he also agreed, that if it be not an Office of profit, the Grantor may enter and out the *Patentee*, but the fee shal remain, as it appears by the 31 H. 8. *Brookes Novell Case* and 18 Ed. 4. And it was not the intent of the *Queen*, that the Earl of Rutland should execute the Office in person, for that should be an undervaluing of him, the which he sayd, was proved by *Sir Robert VVrothes Case* in the *Commentaries*, where an Officer to the Prince was discharged of his attendance, by

alteration of quality of the Prince, and making of him King, and yet the Fee remained.

And to the second it seems, that, the patent hath expresse words of Deputation.

And the third Grant, which hath a reference to the Grant precedent, and al the words being put together make a perfect Grant, and this such construction hath been alwaies made of Grants of the King, as it appears by *Sir John Mullyns Case*, 6 Coke 56. And *Justice Wyndhams case* 5 Coke 7. a. So if the King makes a Lease of a Mannor, except a Grove next to the Mannor, this shal be intended next to the Mannor House, for otherwise it shal be out of the Mannor, and so. the exeption voyde, but *Coke and Foster* doubted of that.

And to the third point, that the Action was maintainable, *Vi & armis*, for when the Deputy of the Earl, of Rutland proclaimed the Court as Deputy of the Earle of Rutland, and these Defendants proclaimed that as stewards of the Earl of Shrewsbury, and after adjourned that; and after held all the Courts and received the profits, it seemed to him, that for this outing and disturbance which is disseisin, action upon the case lies, *Quare vi & armis*, as well as in the Book of Entries 15. two men had Warrens adjoining, and one of them puts Cats, and other vermine into the Warren of the other to destroy it, and the Action of trespassse, *Vi et armis* lyes, and so for menace action of trespassse, *Vi & armis* lies, as it appears by 3 H. 4. and this disturbance is sufficient to maintain an *Affise*, and upon that he concluded that the Plaintiff in the Action ought to recover, and to have Judgment.

And *Harris* the younger Serjeant argued, that the Grant is not good, for default of certainty, as to this Grant of Stewardship, for the Grant is of the Office of Stewardship of the Mannor of *Mansfeild*, and doth not shew where the Mannor is, nor in what County; and it appears, and is put for a Rule by *Hussey* cheife Justice, in the 25. of H. 7. 60. b. That when a man wil have advantage of Letters Patents of the King, it behooveth that they extend certainly to things of which he wil have advantage, see 2. R. 3. 7. a. By *Hussey* 44. Ed. 3. 17. 5 Ed. 4. *Garters Case*, 17 Ed. 3. 15. and *Doddingtons Case*, which is *Hill*, and *Pext*, 2 Coke 1. 31. b. If the Town be misnamed it is good, if there be another certainty, but if it be not named at all, otherwise it is. And to the Point moved by *Hutton*, he conceived that this Office of Stewardship could not be exercised by a Deputy, as it appears by *Littleton in his Chapter of Estates* upon condition, where he saith, that there are Estates upon condition in Law, of which Stewardship is one, fol. 89. *Sett.* 379. That cannot make Deputy without speciall Grants, and with this agreed



agreed *Sir Henry Nevills Case Com. 379. and Long 5. Ed. 4. 26. b.* and by 21 *E. 4. 20. and Sir Henry Nevills Case* before, he could not grant over his office, but if he do not attend to the Execution of that, it is forfeiture, 11 *Ed. 4.* so if he wants skill 29 *H. 6. 42. Per totam curiam*, He conceived that the Law doth not make any difference, between the person of an Earl and another, to the executing of this Office, and that the words of the Patent do not contain words of deputatiou, for in the Grant the words are, *Habendum Officium predictum*, breisly written, *Cum omnibus vadis & feodis eidem Officio, sue ratione ejusdem*, &c. The which last words are expository of the first, that is, that it shal be intended that the Office is contained in the last Grant, and shal not be referred to a Grant precedent, in which the Stewardship is contained, and also he conceived that this Action upon the case doth not ly, *Quare vi & armis*, as it appears by *Fitzherberts Naturabrevium 86. H.* Where it is sayd, that in trespass upon the case, these words, *Vi & armis* are contained in the Writ, shal be sufficient cause to abate the Writ, see 11 *Affise 25.* He which counsels to make Disseisin, shal not be a Disseisor with force, for he ought to do some manual Act, either to the person or to the possession, see 41 *Ed. 4. 24. a.* and 44 *Ed. 3. 20. b.* And so he concluded that this Action is not maintainable, and that Judgment ought to be given for the Defendant for the causes aforesayd.

This Case was argued again by *Nicholls Serjeant for the Plaintiff*, and by *Dodridge the Kings Serjeant for the Defendants*, to the same intent, and it was urged by *Dodridge*, that the Patent contains three severall expresse Grants, which are distinct Grants in themielves, as there be three distinct severall Patents, though they have but one Parchment and one Seale, and if the King grant the Office of parkship of two parks by one self same Grant, if the Patentee be disseised of them, he may have several *Affises*, though that it be but one self-same grant. And he agreed that the words, *officium predictum*, in the 3. grant shall be intended *officium predictum*, and so supply the defect in the second grant, if it were not limitation of the estate in the second grant, but for that, that the second grant was perfect in it self, there need not of necessity any such construction, and that these words shall be referred to the last words, appears by the last words of the *habendum*, that is, *cum vadis & feodis, eidem officio, aut ratione ejusdem officij*, and these Relatives are exposition accordingly. And to the objection of the clause of Assistance in the end of the Patent: he answered that if the grant were ill and void in it self, this Clause doth not supply that. For this is but notification to the Officers of the Queen, that they should be attendant to the said Earl. For though that the Intent of the Queen was, that the Earl of Rutland should execute this office by Deputy, yet this intent shall not

*Nicholls.*

not make the grant good, for though that the Intent of a common person be apparent within the Deed, yet this intent shall not make a voyd grant good, 19 H. 6. 20 H. 6. 22 H. 6. 15. Grant to 2. *Et heredibus*, with warranty to them and to their Heirs, this clause of warranty, though it were the intent of the parties apparent, yet it was not sufficient to make the grant which was voyd good, and so it is in 9 H. 6. 35. Abbot by his deed in the first person grants a Tenement, and the Grantee in the third person, *renunciavit totum Comune quod habuit in uno tenemento*: and though that in this Grant the Intent of the parties is apparent, yet this Intent shall not make the Grant which is void in it self to be good. So if a man makes a Lease for life to the Husband and Wife, and after grants the reversion of the Land that the Husband held for term of life, that grant of the Reversion is void, though that the Intent was apparent, 13 Edw. 3. Grants 63. And so in Patent of the King, grant to a man, and *heredes masculis suis*, is void, though that the Intent also is apparent, that he should have an estate taylor, 18 H. 8. b. Estates 84. But admitting that the Grant may be supplied by the last words, that is, that in the last Grant the words are *officia predicta*, and in the clause of Assistance, yet these words may be supplied, for there are two other Grants, in which there is expresse mention that the Patentee may exercise it by Deputy: and so the words shall have full Interpretation, *Reddendo singula singulis*. And hee conceived that the Writ shall abate for that, that it contains *Vi & armis*. And also the Declaration; for the Jury have not found any disturbance at all. And he agreed that in some cases, Trespasse *Vi & armis* well lyes, as it is Fitzh. Na. Bre. 92. 86. as where it is actuall taking, 45 Ed. 3. 30. 44 Edw. 3. 20. where trespassse *Vi & armis* is maintainable against a Miller for taking of Toll against the Custome, for here is actuall taking, and 8 R. 2. 7. Hosteler 7. In an action of Trespasse, *Vi & armis* against an Host, for that, that certain evill persons have taken the money of the Plaintiff, and good. But where there is not any actuall taking, there the Writ ought not to containe *Vi & armis*, for, for not scowring of a Ditch, or stopping of Water, as it is 43 Ed. 3. 17. But for casting of Dung into a River, action of Trespasse *Vi & armis* lyes, 12 H. 4. But for burning of a house it doth not lye *Vi & armis*, 48 Ed. 3. 25. And so for turning of water-course, 3 H. 4. 5. But in this case there is but disturbance with a word, and commandement to hold a Court, and no Court held, nor no Proclamation made, and so no disturbance at all, 16 Edm. 4. 11. one hath the office of a Parkership, and another man was bound, that he should not disturbe. And in debt upon the Obligation he pleaded that the Obligor hath threatned to disturb him, and adjudged that this is no breaking of the Condition, for there is no disturbance: and in 2 Ed.

3. 25. and 40. *Quo minus* by *Jeffery Scorlage*, where the King grants to the Mayor of *Southampton* the Customes of the same Towne, and in *quo minus* for taking of them, it was adjudged that words are no assault, but there ought to be an act done. But in this Case is nothing found but words, and no act done; but it is found that after the *Defendants* held the Courts. But that doth not appear if it were against the will of the Earl of Rutland or not, and so concludes that the action is not mayntainable. And this case was argued again in Trinity Term next ensuing by the Justices, *Daniel* being dead, but I was not present at the argument of *Foster* and *Warburton* Justices: but I heard the arguments of *Walmesley* Justice, and *Coke* chiefe Justice.

And first *Walmesley* conceived that the Grant was good, and that the Earl of Rutland by this Grant might exercise his Office by Deputy, and this only in respect of the quality of his person, for the Patentee is a Noble man, which hath been employed as an Ambassador of the King into other Realms; and this Grant of this Office being amongst others, varies from them; for this wants the word, *exercendum*, which is contained in the others: and also the office of a Steward is too base for an Earl to execute, for the Steward is but as a Clark, and not a Judge, for he shall not be named in a Writ of false Judgment, nor shall hold plea of any actions but under 40. s. & for that it is not fit nor convenient that an Earl should exercise such a base Office in Person. For if Recovery here be pleaded, it shall be tryed by the Country, 1 *Edw.* 3. And the Steward shall not give Judgment, but the Suitors, and no tryall shal be by Verdict, but by waging Law, and the fee of the Steward is but a 1 d. for every Plaint. And for that it was not the Intent of the Queen that the Earl should exercise such a base office in person, and her Intent is apparent, for that, that the word Exercise is not contained in the Patent. And the Intent of the Queen is to be considered, for the other Offices are fit to be executed by the Earl; for the exercising of them is but a matter of pleasure, as in hunting in the Forrests and Parks of the Queen: and for that if these Grants have not contained words of deputation, the Earl ought to exercise them in person, according to *Littleton*. And Noble men are not to be used as common people, for they are not to be Impannelled of a Jury, and *Capias* doth not lye against him, by which he cannot be outlawed, and for that he shall not be bound to sit in such a base Court, as this base Court is: And all this matter is wel declared and expounded in the last clause of the Patent, where the words are, *Et ulterius volumus & mandamus quod omnes, &c. Sint intendentes & auxiliantes, &c.* Where the words *volumus* in Patents of the King, to amount to as much as *concedimus*, or a Covenant, which is all one with a Grant, as in 32 *H.* 6. The King releases

ses all his right in an Advowson, *Nolentes*, that the Patentee shall be grieved or disturbed, and adjudged that this shall amount to a Grant, and so the word *Volumus*, in the principall case: and also he conceived that the action is well maintainable. *Vi & armis*, as *Quare Impedit*, for disturbance by word, or presentment by word. And it is also found that the *Defendants* did take all the profits, and that the Deputy of the *Plaintiff* came to the usual place where the Court was kept, and that could not be intended to be out of the Mannor. And so for these reasons he concluded that Judgement should be given for the *Plaintiff*.

Coke.

And Coke cheife Justice argued to the same intent, that is, that the *Plaintiff* ought to have Judgment. And first he conceived, that the Patent is good, notwithstanding the uncertainty, that the Mannors are not named in what Counties they are, either in *England, France, or Ireland*, for the Mannor is named very certain, by which it may be granted though it be in the Kings case, as it appears by 32 H. 6. 20. where the King grants all Mannors, Messuages, &c. which were parcell of the possessions of I. S. attaint, and good. And such grant was made to Charles Brandon Duke of Suffolke, and adjudged good, though that the person of a man is more incertain then the Mannor, & yet, *Id certum est quod certum reddi potest*. And 39 Ed. 3. 1. in the Abbot of Reddings case, where a grant was made to the Abbot and his Successors, that the Prior and Covent shall take the profits in time of vacation, *Fitz. Na. Bre. 33.b.* And 23 Ed. 3. 20. The King grants to the Queen the Barrony, and all Mannors, &c. till John of Gaunt be able to govern himselfe, and that shall be intended till the Law intends him able to govern himself, and Mannor is very certain, of which a view shall be awarded. The second exception which was taken to the grant was, for that, that it was to take effect at the full age of the Earl. And after it is recyted in the *Patent*, that he was of full age before the making of the *Patent*, and so by consequence the *Patent* is to take effect from the time that it was past: And to that he said, that it shall be intended to the profits of the Office only, for it appears by the *Patent* that the Queene had granted it to another during his Minority: That is, the office.

Fee when forfeited.

And to the third matter, That is, if hee cannot make a Deputy, then he hath forfeited the said Office, by the not using of it. And to that he said, it appears by *Waltons case*, 10 Eliz. Dyer, fol. 270. That if a man grants a Fee, *pro concilio impendendo*, or keeping of Courts, the Fee shall not be forfeited without speciall request to the Patentee to give Councell, or to hold his Courts, for hee doth not know if the Grantor will have his Courts held or not: and so it is 39 H. 6. 22. *Brewens case*, where it is also agreed, that it shall be no forfeiture of an office without speciall request to hold the Courts, or

to



to give Councell : But in the case of the Queen otherwise it is, for she ought not to make demand in case of Rent nor Condition, though that it be within the *Statute of 32. H. 8.* And yet it was argued in Sir *Thomas Hennages* case, that if the King make a Lease for years upon condition to cease; this shall cease without office upon the breaking of the Condition, but a Lease for life shall not cease without office, though that the Condition be broken: And so if the King grants an Office for life, this shall not be avoided without Office: And he doubted the case of the Lease for yeares: And also he agreed, that the Grantee of a Stewardship, cannot make Deputy to exercise his Office, without speciall words in the Patent: But if the Office be granted to him and his Heires, or to him and his assignes, it is sufficient without other words to make a Deputy: And also he sayd that the word Steward, is the name of an Office, and is derived of Stead and Ward, which are Saxon words, and intend the Keeper of the place, which the party himselfe ought to hold; and it appears by *Cambdem and Lambert*: And so the word *Senescalls* also signify, for this is but a *Custos sive officarius loci*: See *Fleta liber 2. chap. 72. Senescallum providebit Dominus circumspetum fidelem, Modestum & pacificum qui in consuetudinibus, &c. & Jura Domini sui teneri, &c. Quique balivos suos instruere potest, Cujus officium est curia maneriorum, &c.* And a Deputy is a person authorised by the Officer in the name and right of the Officer, and for all that he doth the Officer shall answer, for he is but as a shadow of the Officer: But assignee is in his own right, and he shall answer for himselfe, and forfeiture by assignee of Tenant for life, shall not be forfeiture of the reversion, *39. H. 6.* And he agreed that a Marshall, Steward, Constable, Bayliff, and such like cannot make Deputies, without speciall wordes in the Grant, as it appears, *39. H. 6. 11. Ed. 3. 10. Ed. 4. 14. 17. and 7. 21. Ed. 4. Nevills case in the Com. and Littleton*: And to the exceptions which have been taken to the Writ and Count, he saith that an Action of Trespass, which is founded upon the case, doth not lye *Vi et armis*, where the point and cause is Action, is supposed to be made *Vi et armis*, and for that he takes difference between. *Causa causans*, and *Causa causata*, for where the matter which is supposed to be done *Vi & armis*, is not the point of the Action: But the cause of the Action there lies very well *Vi & armis*: But wherein the point of Action is supposed to be made *Vi & armis*, there the Writ shall abate: As if a man brings an Action of Trespass for casting dung into a River, by which his Land is drowned, in this case an Action of Trespass upon the case, *Vi & armis* lyeth very well, for here the casting in of the Dung, is but *Causa causans*, And the drowning of the Land is *Causa causata*, *8. R. 2.* And so disturbance to hold a Leet, by which

Trespass.



he hath lost his offerings 19. R. 2. 52. And the Earle hath election to have Trespasse or Assise, though it be not Manurable: As if a man prescribe to have seven pence of every Brewer which sells strong Beer, for disturbance to have the seven pence, Action upon the case lyes, for this disturbance is Disseisin 15. Ed. 4. 8. 14 Ed. 3. 4. 1. Ed. 5. 5. 19. R. 2. Action upon the case 51. And to the objection which hath been made, that disturbance found by the Jury, is not the same disturbance, which is mentioned in the Count, for in the Count the disturbance is supposed to be made *Vi & Armis*, but the Jury do not find any disturbance to be made *Vi & Armis*: But this notwithstanding, it seemes that the Count is good: As if a Sheriff enters a franchise and executes a Writ, this is disturbance, and Action upon the case, lyes: And so in *Quare Impedit*: And also he sayd, that the Earle cannot make a Deputy but by writing, as it is resolved 28. H. 8. Br. deputy 17. Where it is sayd that Deputation of an Office which lyes in Grant, ought to be made by Deed and not by Word: But here the Jury have found, that the Earle hath made his Deputy, this shall be intended in lawfull manner, and cannot be but by writing: And also he agreed that the *Habendum* mentioned in the third Grant, shall extend only to this Grant, which is his proper Grant, that the Office of the *Habendum*: And it appears by *Wrotleys* and *Adams* case, *Comment.* 17. That the Office of *Habendum*, is to make certain the Estate and not the thing granted, for this is the Office of the Premises of the Deed: And if the *Habendum* in the third Grant, had had reference to the second Grant, this would make the Grant void: And in Grants of the King other construction shall be made, as it was adjudged in the Court of Wards, *Michaelmasse* 28. and 29. *Eliz.* between *Brunkar* Plaintiff and *Rebotham* Defendant, where the case was, the King *Hen.* the 8. had two Mannors, whereof diverse Lands of one Mannor extended the other Mannor, and then the King granted one Mannor and all his Lands in the same Mannor, *Nec non omnes & singulas Terras, &c.* In the same Town, and adjudged that the Lands which were parcell of the other Mannor, which was not granted, passe by this Grant; though that they are in the other Mannor, in the same Town, and he denied that the words *Precipientes & volentes* shall be taken as a Grant, for they are not spoken to the Patentee, but to other Officers, which are strangers to the Grant: But if the thing granted had been a Chattell, that a Covenant might enure as a Grant, and 10. *Eliz.* *Dyer* 270. 22. The King *Phillip* and Queen *Mary*, granted for them and their Heires and Successors, to *A. B.* That he and his Factors and Assignes might Tavern, and keep a Tavern, &c. Commanding all Mayors and Sheriffs, &c. and other Officers and Subjects and their Heires and Successors, to permit

Grant. le Roy.

permiſſe and ſuffer the ſaid *A. B.* during his life to hold and uſe a Tavern, and to ſell Wine without Impeachment, and it ſeemes that the Grant is void, for that that there is not any time limited, for how long it ſhall indure, and the mandate in the laſt claufe ſhall not make any limitation, for by the death of the Prince this altogether ceaſeth, for *Omne mandatum morte mandantis expirat*: And for that all Proclamations made in time of the Raig of Queen *Elizabeth*, ceaſe and determine by her death: And to the perſon of the Earle, he ſaid that it was a *Maxime*, that Honour and Order ſhall be obſerved, and that was a common ſaying of the ſaid Queen, and for that it was not her intention, that this *Maxime* ſhould be broken, and that the ſaid Earle ſhould exerciſe the ſaid Office in perſon, but ſhe intended the ſaid Earle ſhould overlook the ſaid Mannor, and place here a ſufficient able man to exerciſe the ſaid Office, becauſe he ſhould anſwer, for the miſdemeanour of ſuch a Deputy is the forfeiture of the Office, and he ſaith that the Dignity of an Earle, was the moſt high Dignity in this Realm, that any Subject doth poſſeſſe, till the 11. *Ed.* 3 The black Prince was the 1 Duke, and *Aubry de Vere* the 1 *Marqueſs* in the 11. *R.* 2. and *Beaumont* the firſt vicount in the time of *H.* 6. And none of theſe Dignities are above an Earle in degree, but only in precedency, for *Braſton lib.* 1. chap. 8. ſaith, *Quod Comites dicuntur a ſocitate, quia Comitantur Regem*: And in ancient time none were made Earles but only thoſe which were of the blood Royall, and this is the reaſon that they are called *Conſanguini Regis*, and alſo they may be called *Conſules* a *Conſulendo*, *Tales enim Regis ſibi aſſociunt ad conſulendum & regendum populum Dei*: And at their creation the King gives to them a Robe and Cap, which ſignifies Councell, and Corroner, which ſignifies the greatneſſe of his Blood and Honour, and alſo ſword, *Ut ſit in ntrumque tempus*, as well ready for War as peace: And for that it ſhould be unfit, that one of ſuch Honour, State, and Dignity; ſhould be employed in holding of Court Barons, and there ſit to enter Plaints, and have a peny for every Plaint for his paines, and to make Copies and ſuch like baſe employments which are *Vivida rationes*, which was not the intent of the Queen, that he ſhould exerciſe the ſaid Office in perſon, and the Law requires conveniences in all Grants, as in 12. and 13. *H.* 8.

One liſenſed a Duke to come and hunt in his park, and the Duke came with his Servants and many others of his Retinue, and hunted there, and it was adjudged that the Grant was ſufficient, to warrant his hunting in this manner, in reſpect of the conveniency, for it is not fit and convenient that the Duke ſhould go alone, and 21. *Ed.* 3: 48. The Biſhop of *Carlile* ſued the Executors of his Predeceſ-

for the Ornaments of the Chappel of the sayd Bishoprick; and then recovered, and though that the sayd Chappel was in the private House of the sayd Bishop, yet it was thought fitting, that such Chappel should be adorned with convenient Ornaments, and that these Ornaments should go in succession to the Successors, and not to the Executors, and if conveniency be so required in all these cases, then by the like Reason such inconveniency shall not be admitted, that the Earl should be Clerk to Suitors as every Steward is. And for that he conceived that the Grant is good; And that the sayd Earl may exercise this Office by a Deputy, as well as if a Common person grant an Office of Fostership to the King, he may exercise that by any party, or grant it over, though there be now words of deputation in the Grant, and this in respect of the quality of his person, and in many other cases an Earle or another Noble man shall be privileged, as in 3 H. 6. A Noble man shall not be examined upon his Oath in account, And 48 Ed. 3. 30. He shall not be sworn upon Inquests, which is to serve God and his Country Register 179. And if a common person be in debt to me a hundred pound, I may have a *Capias* and arrest his person for this Debt, but if the King create him Baron or Earl, then his person is so privileged, that that cannot be attached for this Debt, and this is without wrong to me, as it appears by the Countesse of Rutlands case 6. Coke; And if a Baron be returned of a Jury, and if Issue be taken, if he be a Baron or not, this shall be tryed by Record whether he be a Baron or not, 35 H. 6. 46. 22 Affise 24. 48 Ed. 3. 8. Register 47. And in case that one common person hath any Office, which he cannot exercise by a Deputy, yet if he be employed in the Kings service, as if he be made Ambassador out of the Realm, or other such employment, he may during his absence make a Deputy, and this shall not be forfeiture of his Office, and an Earl in ancient time was not only a Counsellour of the King, but by his Degree was *Presectus sive prepositus committatus*, as it appears by Camden 106, 107. Comes *presectus Satrapas*, which is *Prepositus comitatus*, and was in place of the Sherif at this day, and when that he was Sherif, though that he had the custody of the county committed unto him, which was a great trust, yet then by the Common Law, he might make an under Sherif which was but a Deputy, the like Holinsheads Chronicle 463. Amongst the customes of the Exchequer, he called the under Sheriff *Senescallus*, which agreed with the Definition before, for he held the place of Sherif himself, and by the statute of Westminster 8. chap. 39. It is sayd that *Vice comes est vicarius committatus*, and if a Barony descend upon the Sherif, yet he shall continue Sherif, 13. Eliz. Dyer and Britton 43. If a Rybaud strike a Baron or a Knight, he shall loose his Land; And Tenant by Knights service, may execute it by

by Deputy. 7. Ed. 3. *Littleton*: And if it be so in the case of a Sheriff, which hath the County committed to him, that he may make a Deputy by the Common Law, upon that he inferred, that the Steward which hath but the Mannors of the King, committed to him, that he may make a Deputy: And also he said that the words in the last clause, that is, (*Volentes & precipientes*) that the Officers and the Subjects should be attendant, expounds and declares the intent of the Queen, for the words are; *Omnibus premissis*, and the Grant of the Office of the Stewardship is one of the premisses, and so he concluded upon these reasons, that Judgement shall be given for the Plaintiff, and that the Grant was good, and the Action well maintainable: And of this opinion were *Warburton* and *Foster* Justices: And Judgement was given accordingly; this Trinity Term 8. Jacobi.

And *Coke* cheife Justice remembred a Report, made by him and *Popham*. cheife Justice of England, upon reference made to them, that this Patent was good, and that the Earle of Rutland, might exercise this Office by Deputation, and he conceived, that there were other words in the Patent which were found by the Jury, that the said Earle should have the said Office, *Cum omnibus Juribus & Jurisdictionibus*, &c. as full, &c. as any other Patent hath been had, and withall the Appurtenances, and it seemed that a former Patentee had power by expresse words to execute that by a Deputy, and he conceived though these words *Adeo plene*, &c. do not enlarge the Estate, yet this enlargeth the Jurisdiction of the Officer, as in 43. Ed. 3. 22. Grant is made by the King of a Mannor, to which an advowson is appendant, *Adeo plene, & tam amplis modo & forma*, &c. And these words pass the advowson without naming that, and he said it was adjudged *Hillary* 40. *Eliz.* in *Ameridithes* case, where the case was, the Queen granted a Mannor, *Adeo plene & intigre & in tam amplis modo & forma*, as the Countesse of *Shrewsbury* or any other had the same Mannor, and Queen *Kathrin* had the same Mannor and diverse liberties with it of great value, during her life, and adjudged that these liberties should passe also by this Patent by these words, and so in the principall case, if the former Patent had been found also by the Jury, and so was the opinion of *Popham* and him, and was certified accordingly.



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